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*George Palmer*

*25  
38*

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE SUPERIOR COURT

OF THE

CITY OF NEW-YORK.

---

BY JONA. PRESCOTT HALL,

COUNSELLOR AT LAW.

*George Palmer*

"Ne moy reproues sauns cause, car mon entent est de bon amour."

*Motto to Brooke's Abridgment.*

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VOLUME I.

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NEW-YORK :

OLIVER HALSTED, LAW BOOKSELLER,

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1831.

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*Rec. May 27, 1875*

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## PREFACE.

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IT has often been asserted, that for the law to be *known*, is not of less importance than that it should be *right*. This remark is peculiarly just in reference to the promulgation of judicial decisions. The editor, in presenting this volume of reports to the bar of New-York, is animated by the belief, that both these ends will be subserved by their publication ; that the knowledge of what has been ruled by an important judicial tribunal, will not only be disseminated among the profession, but that the decisions themselves will be found to be based upon the satisfactory principles of the ancient law.

It has sometimes been urged, that a rapid accumulation of law books is to be regarded as an evil ; but that this opinion is at least questionable, will be evident to those who will compare the general state of legal learning amongst the profession in this country anterior to the publication of Johnson's Reports, with its condition at the present day. Independently, however, of this consideration, it should be remembered, that society is never stationary ; that new discoveries are springing into existence, as former modes of life and action are passing away ; and that the improvements of society give birth to new varieties of intercourse, which call for and obtain correspondent changes,—not in the *principles* of justice itself,—for these are immutable—but in the *administration* of justice. Hence many of the legal remedies formerly in vogue both in England and in this country have gone into disuse, and other and more simple methods of redress have been devised in their place. Real estate, which once claimed almost the sole attention of English jurisprudence, has in modern times become secondary to the law of personal property. And in answer to those, who deprecate the accumulation of legal adjudications, may it not be pertinently asked, with what degree of skill could the judges

in the reign of Elizabeth (however learned) be supposed to sit in judgment upon a modern bill of exchange, with its days of grace and rules of notice ; upon a policy of insurance, a case of average, or even upon a contract of bailment ? The argument derived from this interrogatory, applies with peculiar force in favour of the publication of judicial decisions in the United States, and nowhere more than in the city of New-York. It was the increased number and importance of legal questions arising in a large commercial metropolis, which led to the establishment of the Superior Court.

The city of New-York had been early marked by the enterprising as a central position for the prosecution of maritime adventure. Its rapid growth subsequent to the revolution, has more than justified the most sanguine expectations. In the space of fifty years, her population has swelled from twenty, to two hundred thousand souls ; and during this period, the vicissitudes of our relations with Europe have given rise to the adjudication, in different courts, of some of the most important questions of maritime and international law. Most of these questions (so far as the people of this city were concerned) arose in the Supreme Court, where, for a series of years, the ability, integrity, and eminent learning of that tribunal has kept pace with the advancement of our population, and reflected imperishable honour upon the judiciary of the State. It could not, however, be expected that in a great and growing community, the limited number of judges, which originally composed that Court, would be capable of transacting the vast and accumulating business of the whole commonwealth ; and accordingly, on the adoption of a new constitution of State Government, in 1821, a revision of the judiciary was deemed indispensable. This revision substantially gave an addition of six judges to the previously existing system. A new bench, consisting of three Judges, was substituted for the former Supreme Court, and to supply the numerical deficiency, the State was divided into eight circuits, in each of which a Circuit Judge was appointed, possessing " the powers of a Justice of the " Supreme Court at Chambers, and in the trial of issues joined in the " Supreme Court, and in Courts of Oyer and Terminer and gaol delivery."

This change, which promised a vast increase of judicial learning and ability, was found fully adequate to the requirements of every part of the state, excepting the city of New-York ; where nearly as

## PREFACE.

many causes of importance are annually tried, (it is believed,) as in all the state beside. It was not to be expected, therefore, that a single Judge, to whom that city was allotted, along with the counties of Kings, Queens, Suffolk and Richmond, however learned or experienced he might be, could be capable, by any exertions, of adjudicating every cause as fast as it arose within his jurisdiction, especially when oppressed with a part of the business of the Court of Chancery. The county of New-York required a provision for itself without being connected with other counties. For a cause to reach a trial in the Supreme Court under the period of twelve or fifteen months from the return of the process had become an unusual occurrence, and this without the imputation of any blame to the Judge of the first Circuit. In the year 1827, these evils had become materially aggravated. It was stated in the proceedings, before the Common Council of the city of New-York, which led to the establishment of the Superior Court, that at the March sittings of the Circuit Court for that year, the calendar consisted of *three hundred and ninety-nine causes* : of which twenty-three were tried, and thirty-four defaulted ; leaving *three hundred and forty-two* causes undisposed of. At the June sittings of the same year, (in consequence of the criminal business before the court,) it was asserted that, of three hundred and fifty-seven causes on the calendar, *not one* was tried. In fact, the exertions of a single Judge had become inadequate to the disposition of the business of the county of New-York alone, without the addition of other counties, even if the terms of the court had been differently arranged.

The anxiety of the bar, in addition to the substantial requirements of the community, suggested various remedies for the evil that existed, and none appeared more obvious than to remodel the Common Pleas, (formerly styled the Mayor's Court,) by enlarging its jurisdiction, increasing the number of its Judges, and extending the length of its terms. This plan eventually assumed a new form, whereby it was determined to *divide* labours formerly allotted to a single Judge : and, in consequence, a petition was presented to the legislature for the establishment of a *new and additional* Court of Common Pleas, to be styled the "Superior Court of the city of New-York," possessing the jurisdiction of the Supreme Court in all civil causes. Accordingly, an act of the legislature was passed the 31st day of March, 1828, to establish this tribunal ; (a copy of which will be found in this volume ;) and to meet the ex-

pectations of the community, a choice of Judges was made with a sole reference to their judicial qualifications. The office of Chief Justice was tendered to and accepted by the Chancellor of the State, and the selection of the other two Judges was made from the first ranks of the bar. The wisdom of the selection may be gathered from the popular voice ; but its highest eulogy will be found in the fact that for more than three years past, this court has disposed of all the causes upon its calendar, as fast as they have been brought to trial ; and such has been the general acquiescence in its decisions, that out of the multitude of causes, which have been argued and decided during that period, but few (scarce five in a hundred, it is believed) have been removed to the Supreme Court.\*

It was, with the view to meet the expectations of the profession in the city of New-York, that the editor early applied himself, under the patronage of the court, to the task of preparing notes of the cases argued at bar, and to the collecting of the opinions of the Judges as they should be delivered. These papers he has endeavored to arrange for publication during the intervals of his professional pursuits, until they have accumulated to a mass much beyond the size of the present volume. With these things premised, the editor submits his labours to the candour of a learned profession, without any expectation however, that his faults will be spared out of tenderness for their author, but from the just consideration, that where the endeavour has been to discharge a duty with diligence and care, much should be abated from the measure of his imperfections.

*New-York, October, 1831.*

\* It appears from the records in the Clerk's Office, that 8000 suits have been instituted in this court since its establishment, and no less than 3327 judgments docketed therein. The number of causes argued and determined at bar exceeds six hundred.



## AN ACT

*For the establishment of a Superior Court of Law in the city of N. York.*

Passed March 31, 1828.

§ 1. There shall be, and hereby is established within the city and county of New-York, a court to be called and known by the name of "The Superior Court of the City of New-York;" which shall consist of a chief justice, and two associate justices.

§ 2. The said chief justice, and the two associate justices, shall be nominated and appointed by the governor, with the consent of the senate; and all vacancies in the said offices shall, from time to time, be supplied in like manner. The said justices, when appointed, shall hold their offices for the term of five years, and shall be subject to removal in like manner as judges of the county courts.

§ 3. The said court shall be held at the city hall of the city of New-York, on the first Monday of every month; and the terms thereof shall respectively be called after the different months in which they are held, and they may be continued and held from the time of their commencement, every day, Sundays excepted, until and including the last Saturday of the same month.

§ 4. The judges of the said court may adjourn the same on any day previous to the expiration of the term for which the same may be held, and also from any one day in term over to any other day in the same term, if, in their opinion, the business of the court will admit thereof.

§ 5. The said court shall have power to hear, try, and determine according to law, all local actions arising within the city and county of New-York, and all transitory actions, although the same may not have arisen therein; and to grant new trials, in all cases where the said court shall find it necessary or proper.

§ 6. Either of the judges of the said court may hold the same for the trial of causes, and for the hearing of non-enumerated motions; but all cases and points reserved at trials, bills of exceptions and de-

murrers to evidence, motions in arrest of judgment, and issues in law, shall be argued or submitted in the said court before a majority of the said judges.

§ 7. The mayor, aldermen, and commonalty of the city of New-York, shall pay out of the treasury of the said city, to the said chief justice, and to each of the said associate justices, for their services respectively, the sum of not less than two thousand dollars, nor more than four thousand dollars annually, at the discretion of the said mayor, aldermen, and commonalty, the same to be paid quarter-yearly, in equal proportions ; and when the salary shall be once fixed, the same shall not be diminished during the residue of the term of office of the said justices.

§ 8. The said court shall have a seal, to be devised by the justices thereof, a description of which shall be deposited in the office of the secretary of state, signed by the said justices, or a majority of them ; and such seal shall then be used as the seal of the said court.

§ 9. The said justices shall appoint a clerk, who shall keep his office at the city hall of the city of New-York, and attend the said court, and officiate as clerk thereof.

§ 10. The said court shall be a court of record, and the forms of process and proceedings now in use in suits brought in the court of common pleas for the city and county of New-York, shall be used in the said court hereby established, as near as may be, except that the proper title of the court shall be inserted therein ; and all proceedings in the said court shall be had before the same, in the same manner as they are now had before the said court of common pleas, except when otherwise directed by this act, and subject always to such alterations as may be made therein, by such rules of practice in the said court as the justices thereof may from time to time establish.

§ 11. All writs and process issuing out of the said court, shall be under the seal thereof, and signed by the clerk, and shall be tested in the name of the chief justice, and shall be made returnable " before the justices of the superior court of the city of New-York ;" and all proceedings in the said court shall be stated to be before the justices, in manner aforesaid ; and all writs directed to the said court, shall be directed in like manner to the said justices.

§ 12. All process issuing out of the said court shall bear teste of one term, and be made returnable on the first day of the term next

thereafter ; and no process shall be tested and made returnable during the same term, except writs of inquiry of damages to be executed out of court, process to compel the attendance of witnesses, and writs of attachment and habeas corpus, which may be issued and made returnable on any day in the same term, when required.

§ 12. The said court shall have no power to send any process into any other county than the city and county of New-York, except in the cases hereinafter specified.

§ 14. Writs of subpoena issuing out of the said court, shall be obligatory upon any witness duly served therewith within this state, in like manner as if such writs had been issued out of the supreme court ; and the said court shall have power to enforce obedience to such subpoena by attachment, to be directed to any sheriff or other proper officer of any county in this state, who shall be subject to all the pains and penalties for not serving or returning the same, in like manner as if the same had issued out of the supreme court ; and the like process and proceedings may be issued and had thereon in the said court, as are usual in like cases in the supreme court, and with like effect.

§ 15. No writ of habeas corpus or certiorari shall be allowed, whereby any cause or proceeding may be removed before a final judgment in such cause, or before a final decision in such proceeding, from the said superior court into the supreme court of this state ; but the supreme court shall have the authority to make an order to remove into the said supreme court any transitory action pending in the said superior court, in which the trial ought to be had elsewhere than in the city and county of New-York.

§ 16. Such order for the removal of a cause shall be made in the supreme court, upon motion, under the like circumstances, and in the like cases in which, if the action were pending in the supreme court, that court would order the venue to be changed from the city and county of New-York to some other county, and in no other cases.

§ 17 Upon filing a certified copy of such order in the office of the clerk of the superior court, such cause shall be deemed to be removed into the supreme court, which shall proceed therein as if the same had originally been brought there ; and the clerk of the said superior court shall forthwith deliver to the clerk of the supreme court, all process and proceedings relating to said cause, to be filed in the office of the clerk of the supreme court in the city of New-York.

§ 18. Any judge of the supreme court, or any officer authorised to perform the duties of a judge of the supreme court at chambers, shall have power, on due cause shewn, to make orders to stay proceedings in any cause pending in the said superior court, for the purpose of affording an opportunity to make the application to the supreme court for a change of venue aforesaid ; and such order may be revoked, in the discretion of the officer granting the same.

§ 19. All writs of error upon judgments in the said superior court, shall be made returnable before the supreme court of this state ; and all the provisions of any act concerning the examination and correction of the errors of the courts of common pleas, shall apply to the said superior court, and to the judgments and proceedings of the said superior court so to be removed by writ of error ; except that in no case shall a writ of error issue, unless upon a certificate of counsel, as is or may be provided for by law with respect to the issuing of writs of error on judgments of the supreme court.

§ 20. There shall be paid to the clerk of the court hereby established, at the time of issuing the first writ in every suit commenced in the said court, the sum of seventy-five cents as a first motion fee ; and for every cause noticed for trial at any term of the said court, there shall also be paid to the clerk, by the party noticing such cause for trial, at the time of putting the same on the calendar, the sum of one dollar and fifty cents, as a judge's trial fee, the said fee not to be paid more than once in any cause ; and the above fees shall be received by the clerk of said court, and be by him accounted for and paid into the city treasury.

§ 21. All the existing provisions of law, and all such as shall hereafter be adopted relating to costs in the supreme court, and the fees of the officers thereof, and the fees of officers of circuit courts, shall apply to the court hereby established, and its officers.

§ 22. Every judgment recovered in the said court hereby established, and docketed of record therein in the manner prescribed by law, shall, from the time of such docketing, be a lien upon all the lands and tenements of every person against whom such judgment shall have been obtained, situated within the city and county of New-York, and in the same manner, and to the same extent, as if such judgment had been rendered and docketed in the court of common pleas of the city and county of New-York.

§ 23. The chief justice, and each of the associate justices of the said court, may exercise all the powers and authority incident to their offices at chambers, touching any suit, judgment or proceeding in the said court ; and it shall be the duty of at least one of them to attend daily, at all seasonable hours, in the office to be provided for them by the said mayor, aldermen and commonalty, for the despatch of chamber business ; and the said justices and each of them shall moreover be, and they are hereby authorised to perform all the duties which the justices of the supreme court out of term are authorised to do and perform, by any statute of this state.

§ 24. All writs of certiorari to the justices of the marine court of the city of New-York, and to the assistant justices of the said city, or either of them, shall issue out of the said superior court, and be returnable therein, in the same manner, and for the like purposes, as *such writs are now issued* out of the supreme court of this state, and under the same regulations and restrictions as are now prescribed by law ; and after the return of such writs into the said court, judgment shall be given on an issue joined in the usual form, upon written arguments of counsel, if the parties shall think fit, or by submission without argument ; and in no such case shall an argument be heard at bar, unless the said court shall, by reason of the importance of the question of law involved therein, direct an argument at bar. And from and after the time when the justices of the said superior court, to be appointed under this act, shall enter upon the duties of their office, it shall not be lawful for any writ of certiorari to the justices of the marine court and assistant justices aforesaid, to issue out of, or be returnable in, the said supreme court of this state.

§ 25. In case of the prevalence of any pestilence or public calamity in the city of New-York, or in case any other cause should render it necessary, the mayor, or in his absence or sickness, the recorder of the said city, by a proclamation under his hand, to be published in two or more of the newspapers printed in the said city, may direct the holding of the said court by this act established, at such place within the city and county of New-York, other than the city hall, as may be considered most safe and proper for such purpose.

§ 26. In case said court shall not be formed at any time, by reason of the non-attendance of all or any of the justices thereof, either at the usual place of holding the same, or at such other place as shall be

directed by the proclamation of the mayor or recorder in the cases herein provided for, it shall then be lawful for the clerk of the said court to adjourn the same from day to day, or until the next term, and all process and other proceedings shall be continued over accordingly.

§ 27. The supreme court of this state shall, on the consent of both parties, order and direct that any action or proceeding of a civil nature pending in the said supreme court, the venue whereof is laid in the city and county of New-York, and in which no verdict shall have passed, or plea to the merits have been decided, be transferred and continued over to the said superior court hereby established; and such action or proceeding shall be there proceeded in with the like effect, and in the same manner, as if originally had or commenced therein. And the supreme court shall possess all the necessary powers for the removal of all papers and files relating to such action or proceeding, to the said superior court; but nothing herein contained shall be construed to invalidate any bond or recognizance made or entered into in any action that may be so removed, but the same shall continue of as much validity as though this act had not been passed. And where bail has been given in any such suit, the surrender of the defendant in the said superior court shall have the like effect, as a surrender in the said supreme court would have had, if this act had not been passed.

§ 28. It shall be lawful for the defendant in any action in the said superior court, to enter special bail, and to surrender himself, or for his bail or manucaptor to surrender him, in the same manner, and before the same officers, as if he had been arrested by process from the supreme court.

§ 29. All suits upon recognizance of bail taken in such court, shall be brought in the same manner as if the action had been commenced in the supreme court.

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## AN ACT

*Relative to the superior court and general sessions of the city of N. York.*

Passed February 8, 1830.

§ 1. The provisions of the first and second sections of the first Title of the sixth Chapter of the Third Part of the Revised Statutes shall

apply to the superior court of the city of New-York ; but this section shall not be so construed as to authorise the commencement of a suit by the service of a declaration on any person residing out of the city and county of New-York.

§ 2. All the powers relative to the hearing of non-enumerated motions, which, by the sixth section of the act for the establishment of the said superior court, passed March 31st, 1828, are vested in a single judge of the said court, may be exercised by such judge at chambers, under such rules and regulations as the said court may establish.

§ 3. The provisions of the twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh sections of the third Title of the first Chapter of the Third Part of the Revised Statutes, shall apply to the said superior court and the judges thereof.

§ 4. It shall be the duty of the clerk of the city and county of New-York to draw the names of not exceeding eighty four instead of thirty-six persons, to serve as jurors in the said superior court and court of general sessions respectively, according to the provisions of the twenty-fourth section of Article second, Title fourth, Chapter seventh, of the Third Part of the Revised Statutes.

§ 5. This act shall be in force and take effect immediately upon the passage thereof.





**JUDGES**  
**OF THE SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW-YORK,**  
**DURING THE PERIOD OF**  
**THE REPORTS CONTAINED IN THIS VOLUME.**

---

**SAMUEL JONES, Esq. Chief Justice.**

**JOSIAH OGDEN HOFFMAN, Esq. } Justices.**  
**THOMAS J. OAKLEY, Esq. }**




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C A S E S

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW-YORK. .

JAMES JACKSON, *ex dem.* ARCHIBALD GATFIELD,  
*versus*  
 WILLIAM H. STRANG.

CHARLES GATFIELD, by his will, dated April, 1798, devised as follows: "I give August Term 1828.  
 and bequeath to my wife Sarah, all my estate, real and personal, during her life: Jackson  
 the house and lot No. 37, situate in Mulberry-street," "to my heirs Maria and v.  
 "Eliza Gatfield in fee-simple forever: if one of them should die, the property to Strang.  
 "descend on the other: in case both should die, the property to descend on my  
 "wife Sarah; only she is to pay to my brother Archibald Gatfield one shilling  
 "if demanded."

The testator died in 1793. Maria died in her childhood; Eliza attained the age of 21 years, married, and afterwards died in the lifetime of her mother, without leaving or ever having had any issue, and without making any disposition of the property. Her husband also died in the lifetime of the testator's widow. The widow, shortly after the husband's death, married one Strang, by whom she had issue five children, who were her heirs at law. She continued in the possession of the premises until 1827, when she died. After her death Archibald Gatfield, the heir at law of the testator, brought an action of ejectment against the defendant, who was one of the children and heirs at law of the widow, for the recovery of the house and lot.

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*Held*, that he was not entitled to recover. That the words "if one of them "should die," and "in case both should die," should be taken to mean a *dying without lawful issue*; that the court were at liberty to supply the words, in order to carry the testator's intention into effect; and that upon the death of the daughters without issue, the whole estate in the house and lot became vested in their mother.

THIS was an action of ejectment, originally commenced in the Supreme Court, to recover a house and lot situated in Mulberry-street, in the city of New-York. It was afterwards transferred to this court by agreement of parties, according to the provisions of the act under which it is constituted.

At the trial, as the points of controversy were questions of law exclusively, a general verdict was returned in favour of the plaintiff, by consent of parties, subject to a case to be made; and each party had liberty to turn the same into a special verdict or bill of exceptions.

The facts, presented by the case were as follows: Charles Gatfield, (from whom the plaintiff claimed to derive his title) died in the year 1798, seized in fee of the premises in question, and at his death left a will of the following tenor, viz:

"In the name of God, amen. I, Charles Gatfield, of the city of New-York, gunsmith, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make and ordain this my last will and testament, that is to say: first, after all my just debts be paid and discharged, I give and bequeath to my beloved wife, Sarah Gatfield, all my estate, real and personal, during her life. The house and lot No. 37, situate in Mulberry-street, containing in front twenty feet, in rear fifteen feet, and in depth ninety-five feet, to my heirs, Maria and Eliza Gatfield, in fee-simple, forever: if one of them should die, the property to descend on the other; in case both should die, the property to descend on my wife Sarah Gatfield, only she is to pay to my brother Archibald Gatfield, one shilling, if demanded. I make and ordain my wife, Sarah Gatfield, to be executrix of this my last will and testament, hereby utterly disallowing and revoking all former wills by me made. In witness whereof, I have hereun-



"to set my hand and seal the twenty-third day of April, A. D. August Term  
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It was admitted that this will was duly executed, proved and recorded, and that the testator at the time of its execution was of sound mind and memory.

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Eliza Gatfield, one of the daughters mentioned in the will, died in her childhood; the other daughter, (Maria,) attained the age of twenty one years, was married, and died, during the lifetime of her mother, but without issue, and without having disposed of the premises in question. Her husband died, also, during the lifetime of the wife of the testator.

Sarah Gatfield, shortly after the death of her husband, and in the year 1798, married one Strang, by whom she had issue, five children her heirs at law; one of whom was the defendant in this suit; and who, together with the other heirs of Sarah, were tenants of the premises in controversy. The premises remained in the possession of the mother until her death, which happened in the year 1827, and before the commencement of this suit.

Archibald Gatfield, the lessor of the plaintiff, was the surviving brother and sole heir at law of the testator and his daughters Eliza and Maria.

Upon this state of facts, *Mr. R. Lockwood*, for the plaintiff, contended,

I. That the two daughters of the testator took a fee by *descent*, and did not take at all under the will, as purchasers or devisees. [*Doe, ex dem. Pratt, v. Timins and another*, 1 B. & A. 530.]

II. That if they took a fee by descent, the limitations over in the will, between the daughters and the wife, were void. [*Fearne*, p. 372. 468. *Lon. ed.*] The court will not divest the heir at law, if a fee once vested in him, unless the defeasance is certain, and not left to conjecture. In this case the *intent* is left wholly uncertain. [*Denn v. Gaskin*, 2 *Cowp.* 660.]

III. If the daughters take by *devise*, and not by *descent*, they

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IV. The limitations over after the first devise to the daughters in fee-simple, if the daughters take by devise and not by descent, are void for repugnance. [*Jackson v. Bull*, 10 *Johns. R.* 19.] By the construction of the defendant's counsel, the wife would take a vested fee, descendable to her heirs general, and capable of alienation; while the daughters would take a mere life estate, which would be manifestly repugnant and void. [*Jackson v. De Laney*, 13 *Johns. R.* 537. *Jackson v. Robins*, 15 *ib.* 169. *Same case in error*, 16 *ib.* 537.]

V. The limitations over are void for uncertainty. [*Constantine v. Constantine*, 6 *Ves.* 100.] 1. In this case, the expression changes from "house and lot" to "property;" and may mean *personal* property merely, or the residue of the testator's estate. It is altogether uncertain what property is meant. 2. The words, "if one of them should die," &c. may mean, if one of them should die in the testator's lifetime, or in the lifetime of the tenant for life, or without issue, or without disposing of the property, or unmarried, or before the age of 21 years. 3. If an absolute estate is created, words importing limitation are to be construed strictly. [*Roberts v. Pocock*, 4 *Ves. Jun.* 157-8.]

VI. The words in the will "in case one should die," and, "in case both should die," are to be construed "if dying in the lifetime of the testator." [*Trotter v. Williams*, *Pre. Ch.* 78. *Galland v. Leonard*, 1 *Swanet. Rep.* 161. *Lawfield v. Stoneham*, 2 *Strange* 1261. *Hinckly v. Simonds*, 4 *Ves. Jun.* 160. *Turner v. Moore*, 6 *Ves. Jun.* 567. *Webster v. Hall*, 8 *Ves. Jun.* 410. *Ommancy v. Bevan*, 18 *Ves. Jun.* 291. *Cambridge v. Rous*, 8 *Ves. Jun.* 12. *Scott v. Price*, 2 *Serg. & Rawle*, 59. *McClintock v. Mams*, 4 *Munf. Rep.* 328.]

[The following cases were also critically examined and commented on by the counsel for the plaintiff. *Lord Douglas v.*

*Chalmer*, 2 *Ves. Jun.* 501. *King v. Taylor*, 5 *do.* 806. *Billings* August Term 1829.  
*v. Sandon*, 1 *Bro. C. C.* 393-4.]

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*Mr. J. Anthon* for the defendant.

I. The *intent* of the testator, if discoverable and consistent with law, governs the devise.

II. In this case, as far as concerns the lessor of the plaintiff, the testator's intention to disinherit *him*, and give his property to other objects of his bounty, is manifest from the final devise over to the widow, with the direction to pay him one shilling if demanded.

III. This devise to the widow is a good contingent remainder in fee, being supported by the particular estate of freehold originally devised to her, and dependent on the contingency of her surviving her two daughters; which having taken place, she died seized in fee simple, and the inheritance descended to the defendant.

IV. The devise to the testator's two daughters was a contingent remainder, dependent on the contingency of their surviving their mother: supported likewise by the particular estate of freehold in the widow, with an executory devise over to the survivor of them in fee.

V. The devises are in no wise repugnant, but are perfectly consistent; being a devise for life to the widow, with remainder to her in fee, should she survive her two children; and in the event of her not surviving them, then a remainder to them jointly in fee, with an executory devise over of the whole in fee to the survivor.

The counsel for the plaintiff has inverted the natural and proper order of inquiry. The first object is to discover the intention of the testator; if *that* is manifest from the face of the will, we should endeavour to support it by the rules of law, and carry it

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into effect. But the opposite course has been taken, and the counsel for the plaintiff has gone into a technical analysis of the will, without looking at the obvious meaning of the instrument itself. The object of the testator clearly was to create, 1. An estate for life in the widow. 2. Remainders to his two children in fee, if they should survive their mother, with an executory devise to the survivor of them. 3. A remainder contingent to the widow depending upon the event of her surviving the daughters.

The particular points involved in this will, with the general learning applicable to them, have been so often discussed, especially in the controversies growing out of Eden's will, that it will be sufficient to give a reference merely to the authorities. By the decided cases it will appear, that these are all contingent remainders, with the exception of the devise over to the survivor of the children, which is an executory devise and limited after a fee. [*Jackson v. Anderson*, 16 *Johas.* 382. *Lion v. Burtis*, 20 *do.* 483. *Wilkes v. Lion*, 2 *Cowan* 333. *Jackson v. Thompson*, 6 *Cowan* 179.] If such are the estates, can they be legally carried into effect? This question is best answered by the decisions in the following cases. [*Gulliver v. Wickes*, 1 *Wils.* 105. *Dumwoodie v. Reed*, 3 *Serg. and Rawle* 442. *Harris & Wife v. Smith*, 3 *Yates* 141.

JONES, C. J., delivered the opinion of the Court. Charles Gatfield, by his will, dated April, 1798, devised as follows: "I give and bequeath to my wife Sarah all my estate real and personal during her life. The house and lot No. 37, situate in Mulberry-street, containing in front 20 feet, in rear 15 feet, in depth 95 feet, to my heirs Maria and Eliza Gatfield in fee-simple forever: if one of them should die, the property to descend on the other; in case both should die, the property to descend on my wife Sarah, only she is to pay to my brother Archibald Gatfield on shilling if demanded." The testator died in 1798.

Maria died in childhood; Eliza attained 21, married, and afterwards died in the lifetime of her mother without leaving or ever having had any lawful issue, and without making any disposition of the property. Her husband also died in the lifetime of the testator's widow.

The widow, in 1798, shortly after her husband's death, married one Strang, by whom she had issue, five children, who are her heirs at law. She continued in possession of the premises until 1827, when she died. After her death, this suit was brought by Archibald Gatfield, who is the heir at law of the testator and of his surviving daughter Eliza, against the defendant, who is one of the children and heirs at law of the widow.

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The question is whether, by the will of the testator the remainder in fee of the premises, on the death of his daughter Eliza, descended to the plaintiff as heir at law of the testator, or vested in the widow? and the solution of this question depends on the validity and legal effect of the limitations or devises over of the inheritance, in the events contemplated by the will.

The widow and two daughters survived the testator; and on his death the devises to the wife for her life, and to the daughters after her death in fee, subject to the limitations over, took effect. Upon the death of Maria, the daughter who first died, her moiety of the estate either accrued to the sister by the limitation of the will, or descended to her as heir at law. The surviving daughter, Eliza, consequently became vested, on the death of her sister, with the whole. But she died without issue, and in the lifetime of her mother; and that event brings up the question upon the limitation or devise over to the mother. By the terms of that devise, in case both of the daughters should die, the property was to descend on the testator's wife. In what sense were the words "in case both should die" used by the testator? Did he intend to refer to the death of the daughters generally, whenever such death should happen? or was it his intention to refer to the event of death within some given time, or under some special circumstances? On the literal, grammatical construction of the terms, they would refer to the death of the devisees, without any qualification whatever; but on that construction, the daughters could in no event take a larger interest under the will than an estate for life; for the event of their death, on which the fee in terms devised to them would in that case be limited over to the wife, was certain to happen. It was absolutely certain that both daughters would die; and the inheritance must go upon

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the death of the survivor of them to their mother or her heirs. Could that have been the intention of the testator? He in express terms devised the remainder of his estate to his daughters in fee-simple forever. He could not surely intend to destroy, by the devise over to the wife, the estate which he had created by the previous devise to the daughters, by cutting down the fee expressly given them to an estate for life. Or, if such were his intention, would the established rules of law allow it to prevail? It is a well-settled rule, that where a limitation or devise over, so directly conflicts with the first or principal devise, that both cannot by any rational construction stand together, the limitation, or devise over, must be rejected as void for repugnancy. Now, the limitations of this will, if the event on which they are to arise is the death of the daughters, without restriction of time, place, or circumstance, must necessarily displace the devise to them of the inheritance, and reduce their interests to estates for life. Such a construction would render the words "in fee-simple forever," annexed to the devise to the daughters, wholly inoperative. It would disappoint the just expectations of the immediate and most natural object of the testator's bounty; and it would moreover inevitably disinherit all the children and lawful issue of the daughters, and substitute the heirs of the wife of the testator in their place. We should unsettle the best established rules of construction, contravene the express language of the will, and violate all probability, if we imputed such intentions to the testator; and unless the terms used by him are susceptible of some other exposition, we might, perhaps, find it difficult to sustain the devise over to the wife. But in expounding wills, effect is to be given to every disposition and limitation of the testator, if the whole will, taken together, will admit of such a construction. If, therefore, the words employed by the testator to designate the event on which the devise over is to take effect, can be understood in any restricted or qualified sense, so as to reconcile the limitation over with the previous devises, a just regard to the intention of the testator requires, that they should be so understood. And I assume the position, that the testator, when he referred to the death of one of his daughters as the event upon which the other was to take the whole, and to the

death of both as the event upon which the estate given to them in fee was to go over to his wife, must have intended to refer to that event in connection with some contingency, which he had in his mind at the time, but has omitted to express. Indeed, besides the incongruity of ideas imputable to him in devising the same estate to the same persons, in fee, and for life, the terms in which he expressed himself import contingency, and require the application of the words to some uncertain event to make them intelligible. The words "in case," and the word "should," are inapplicable, and without meaning, if he intended to speak simply of the event of death which was sure to happen; but they were appropriate terms if intended to apply to the death of the daughters without issue, or within any limited period of time, as his own life, for example, or the life of his wife, either of which would be an uncertain and contingent event, and might happen or might fail to happen. Assuming, then, as I do, that the hypothetical phrase, "in case both should die," must be understood to have some limit or qualification, the question presents itself, what that limit or qualification ought to be. This is a question of intention, upon which we must exercise our best judgment, from the lights afforded us by the indications appearing on the face of the instrument, and by the circumstances under which the will was made, as disclosed in the case; with these guides we are to discover the probable intention of the testator, and that exposition is to be preferred which, keeping within the rules of law, will best subserve the general intent, and lead to the most satisfactory results, as respects the particular devises.

This view of the subject seems to be taken by the parties themselves. They both agree that the death of the daughters simply could not be the event on which the estate was to go over to the wife; but suppose that their death within a limited period of time was the contingency he had in contemplation, and each of them presents his own exposition, the plaintiff contending that the contingency contemplated by the testator was the death of the devisees in his own lifetime, and that the object of the limitation over to the wife was to prevent the devise from lapsing; but the de-

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pendant insisting, that the death of the daughters in the lifetime of the wife was the contingency which the testator had in view, and that his intention was to limit the estate to his wife absolutely, and prevent the descent of it to the collateral heir, in the event of her surviving both her daughters. These several expositions have been defended by the respective advocates with great ingenuity and ability. Neither of them is free from objection; and the difficulties which surround them both urge strongly the preference of another qualification, founded on a different principle, and which will be hereafter considered. The argument in favour of restricting the event of death to the lifetime of the testator is, that the limitation on that construction trenches least on the fee previously devised to the daughters, and operates as a provision for the single case of lapse of the devise by the death of the daughters in the lifetime of the testator.

But the objections to that exposition are, that it reduces the devise over to the wife to nearly a nugatory and senseless provision, and, as regards the first devisees in fee, can in no turn of events be of any use or benefit to themselves, but might work injustice to their issue by excluding them from the inheritance. The only object of a limitation to the wife, in the event of the death of the daughters in the lifetime of the testator, is conceded to be, to guard against a lapse of the devise. But as regards the first limitation between the daughters in the event of the death of one of them in the lifetime of the other, and before the death of the testator, the estate of the deceased would, without any devise over, either accrue to the surviving sister, in which case its operation would be the same as that of an express limitation to the survivor: or it would descend to the sister as heir at law of the testator; and in that case it would be more favourable to the sister who should happen to die, as it would keep open the door to let in her issue to partake of the inheritance. No such limitation over by will to the wife was necessary therefore, or of any utility to provide for that contingency. Would it be more operative, or useful, as a provision for the case of the death of both daughters in the testator's lifetime? In that case it is said the whole devise to them would lapse. Let it be con-



ceded that the devise would lapse ; must not the consequence be, that the estate subject to the life estate of the wife would descend to the issues of the daughters, if they left any, as the heirs at law of the testator ? And if so, the lapse would be more beneficial and desirable to them than the limitation over. But even if the effect of the lapse could be to disinherit the issue of the daughters, still that consequence would not be obviated by the limitation over to the widow, for its operation would be to vest the inheritance in her, in exclusion of the issue of the daughters. What inducement could the testator have for a provision so useless to the first objects of his bounty, and which might operate so severely upon his grand-children ?

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It appears by the case that the testator made his will in the latter end of April in the year 1798, and died the same year.

Whether the will was made in the last illness of the testator, or when he was in health, does not distinctly appear : the will itself is silent on the subject ; but while it represents the testator to be of sound mind and memory, it does not state him to be in good bodily health ; and, perhaps, the fair intendment may be that the will was made in the immediate contemplation of approaching death, and was intended to settle his worldly affairs preparatory to that event.

And if so, the limitation to the wife upon the death of both his children before himself would be entirely illusory as a provision for her, and nugatory as a safe-guard for them : And if the will was made by the testator when in perfect health, and not in the immediate prospect of death, such a limitation would be comparatively of little value to the wife, for she could never profit it by it unless both the daughters died in the lifetime of the testator, and she survived him ; events which, under the circumstances of the supposed case, could not be expected all of them to concur. Besides, he had already given her his whole estate for the term of her life, which he contemplated her to take at his death ; and his ulterior dispositions would more probably have a prospective view to the termination of that estate, than to his own death ; his general intention was to confer his whole estate upon his wife for her life, and to transmit it after

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her death to his children; but in the event of the failure of his own issue to inherit, his ulterior intention was to substitute his wife in their place as the next object of his bounty, and to prefer her to his collateral heir; these intentions are clearly to be collected from the will; and is it probable, that with such views he would restrict the limitation in favor of his wife, on the failure of his issue, to the contingency of the death of the daughters in his own lifetime? The consequence of such a restriction would be, that his whole scheme for the settlement of his estate would be defeated if either of his daughters happened to survive him; for the devise to the surviving daughter would in that event become absolute, and the limitation over to the wife could never take place, but the whole estate, on the death of the daughter subsequently without issue, if undisposed of by her, would descend to the collateral heir, and in no degree benefit the widow. Could the testator intend to confer the inheritance upon his wife to the exclusion of his collateral heir, in the event of the death of both his daughters in his own lifetime, and yet mean, that if either of them survived him, his widow should be confined to her life estate, and the inheritance in case of the failure of his own issue descend to his collateral heir? Intentions so inconsistent and improbable cannot be ascribed to him, unless imperatively called for by the expressions of his will. His motives for preferring his wife to his brother and collateral heir, would be the same whether his daughters died in his lifetime or survived him; and as he has so unequivocally manifested his intention that the inheritance primarily devised to his children, and obviously intended for his own issue, in preference to all others, should, in the event of the failure of such issue, devolve upon his wife as the next object of his favor, we must in determining the true sense of the terms he has employed to express his meaning, and which are admitted to be susceptible of different significations, give the preference to that which will best effectuate such general intentions: And if this rule is to govern, we cannot, surely, restrict the contingency of the death of the daughters to the lifetime of the testator, when the words he has employed are as well satisfied by extending it to the period of

the death of the wife, and when the narrower construction so materially interferes with the probable views of the testator.

But it is contended, that the legal sense of the terms of this contingency has already been settled to be a dying in the testator's lifetime. And we are referred to a series of decisions upon bequests of personal property as settling the rule of construction applicable to such a limitation. It is conceded that the cases cited at the bar, and others in the English Courts of still more modern date, have adopted and established it as a general rule for expounding bequests of personal property, that when the words "if he (the legatee) should die," or the words "in case of death," are used by a testator, to signify the event on which a limitation over is to take effect, and those words are unexplained by the testator, and without qualification, they shall be construed to import the contingency of the death of the legatee before the testator. But this is a rule for the construction of personal bequests.

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I have seen no case in which it has been applied to a devise of land; and while the books abound with examples of gifts of personal property, which have been settled by that rule of construction, not a solitary instance has been produced of a similar decision in the case of a devise of real estate.

Does not this view of the cases tend to the conclusion, that the rule refers to personal bequests exclusively, and is inapplicable to devises of land?

But it is urged, that as the rule refers to a question of intention, the same terms must be understood in the same sense when applied to real, as when applied to personal property; and the argument receives countenance from the opinion of Lord Kenyon in the case of *Porter v. Bradly*, cited from 3 D. & E. p. 145.

In his comments in that case, upon the words "dying without issue," he adverts to the distinction taken in *Forth v. Chapman*, between the construction of that phrase when applied to chattels, and when to freehold interests, and observes, that it would be very strange if those words had a different meaning when applied to real estates, from what they have when applied to personal property; he disapproves the distinction, and denies it to be law.

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But these *dicta* being uncalled for by the case then before the court, they do not carry with them the force of authority.

And, notwithstanding the weight of Lord Kenyon's *obiter* opinion, the distinction between the legal sense of those terms, according to the interests to which they refer, is firmly established.

The reason of the distinction is found in the difference between the properties of real and personal estate; and an attentive consideration of the nature and properties of the two species of estates will satisfy us that it rests upon solid grounds. The intention of the testator in such a limitation, whatever the estate may be to which it is applied, is to provide for all the issue of the devisee as long as he shall have any, and after the failure of issue, to transfer the estate to the next object of his bounty. That purpose is accomplished in devises of estates of inheritance by construing the words, "dying without issue" to import an indefinite failure of issue, and to create an estate tail in the immediate devisee, with a remainder in fee to the devisee in remainder. But a chattel cannot be entailed; and the words of the devise, when chattel interests are the subject of them, must receive a different construction, or they will be inoperative. The intention must in that case bend to the rules of law, in order to preserve the limitation, and give it effect. In a devise, therefore, of real and personal estate to A., and in case of his death without lawful issue to B., the words without "lawful issue," when referred to the inheritance, would be construed an indefinite failure of issue, and create an estate tail in A. with remainder in fee to B.; but in reference to the personal estate, they would be held to mean a failure of issue at the death of A., and vest in B. an interest by way of executory devise.

In *Forth v. Chapman*, (1 Peere, Wms. 663.) this distinction was recognised and established. The devise there was of estates of inheritance and leasehold interest to two nephews of the testator, with a devise over, in the contingency of the death of either without issue of his body: the Chancellor held it a valid limitation; ruling, that the construction as to the freehold estates should be the dying of the nephews without issue general-

ly, by which there might be at any time a failure of issue ; and with respect to the leasehold, the same words should be intended to signify a dying without leaving issue at the time of the death and he said that it might be reasonable enough to take the same words as to different estates in different senses. The principle of that case has been uniformly sanctioned, and always acted upon in after times. Lord Kenyon himself, in *Goodtitle v. Pegden*, 2 Term. Rep. p. 720., assumes as the ground of his judgment, that the distinction in *Forth v. Chapman* had remained unshaken to that time ; yet that learned judge was the first to shake its authority. But the *dictum* in *Porter v. Bradley*, which arraigns the distinction so fully established by the whole current of prior decisions for upwards of sixty years in the English courts of law and equity, has never been followed or recognised as law ; and Lord Eldon, in *Crooke v. De Vandes*, 9 Vesey, p. 197., when that *dictum* was cited and relied upon, took occasion to observe, that it went, in his view of it, to shake settled rules to their very foundations, and that he would not add to its authority. Lord Eldon, in the view he takes of the case of *Forth v. Chapman*, illustrates and confirms the distinction it establishes, and gives it the sanction of his own authority. I have bestowed the more attention upon the review of these cases because the principle which pervades them, and which supports the distinction between the legal sense of the words "dying without lawful issue," when they refer to real estate, and the signification of them when applied to personal bequests, has a strong bearing upon the construction of the words used in the will now under consideration. The same principle will justify a similar distinction in the exposition of the words "in the case of the death of both" used in this will, and authorise us to take them as to different estates in different senses. And if it shall be shown, that the words may be fitly referred to the death of the testator in cases of bequests of personal property, and can be more properly referable to some other event, in cases of devise of real estate, we shall be at liberty to hold them to refer in this case to such other event, and not to the death of the testator. Now, the great

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and leading object of the rule which restricts the contingency of the death of the legatee to the lifetime of the testator in cases of personal bequests, where the time is left indefinite by the will, is the preservation of the gift for the use of the legatee to whom it is bequeathed. The practical effect of the limitation over on the death of the legatee, if unrestricted, would be to reduce his interest to a life estate, and limit him to the use or interest of the property for his own life only, and to vest the principal in the legatee in remainder; and the only rule of construction by which that consequence can be avoided, and operation be at the same time given to the limitation, is to restrain the contingency upon which it is to arise to the death of the testator. On that construction the testator is understood to intend the bequest for the sole benefit of the first legatee, and the ulterior limitation to the second legatee, as a substitute for the first legatee in case he should be prevented by his death in the testator's lifetime from taking it himself. And the legal effect of the rule will be to render absolute the right of the first legatee to the bequest, if he survives the testator, and to leave to the limitation over simply the operation of preventing the lapse of the legacy by the death of the legatee in the lifetime of the testator. This rule of construction is evidently the child of necessity. It is peculiarly adapted to bequests of personal property, and as yet has been exclusively applied to interests of that nature. But to bring this case within the rule, supposing it to be in any case applicable to devises of real estate, it must be assumed that there are no features on the face of this will, nor any ingredient in the case to indicate the intention of the testator; for the leading cases on the subject all admit that the rule is to apply to such cases alone; and in *Cambridge v. Rous*, (8 Ves. 21.) where the rule was most distinctly laid down, the Master of the Rolls confines it to cases, where the words occur by themselves, and there is nothing to explain them. And in all the subsequent cases where the rule is recognized, it is conceded as a qualification of it, that the intention of the testator, if it can be collected from the whole context of the will, shall controul it, and the words shall be construed to import the contingency which the testator appears to

have contemplated at the time. It is in cases only where no other intention can be discovered, that the rule which restricts the contingency to the lifetime of the testator, is applied. Is this such a case? In this case the express devises to the wife for her life and to the daughters indicate a general intent to make them the objects of the testator's bounty; and the limitations which follow show a particular intent to provide for the ulterior disposition of the estate in the event of the failure of those primary devises. The inferences to be drawn from these circumstances, and especially from the cross remainders between the daughters, and the condition annexed to the devise of the fee to the wife, give a character of its own to this will, and indicate an intention which appears to me to exclude the application of the rule contended for, even if it would be otherwise applicable. But without dwelling longer on the point, it appears to me decisive against the application of that rule to the case, that the effect of it would be to carry the whole estate, in the event of the death of the daughters in the testator's lifetime leaving issue, to the widow, to the exclusion of all the grand-children: and that, in the event of either of the daughters surviving the testator, and the subsequent death of such as might survive him without issue, the estate, if undisposed of by them, instead of devolving upon the widow, the declared object of the testator's preference, would descend to the brother, whom he has shown a most unequivocal intention to exclude.

But would the probable intention of the testator be better consulted by extending the contingency to the death of the wife? That a limitation in fee to the wife, in the event of the death of both the children in her lifetime, would be good by way of executory devise, cannot be denied; and it is obvious, that the ulterior devise to her would be more beneficial to her, under that construction, than it would be if the limitation was restrained to the life of the testator. But this construction, while it produced these effects, would be more disadvantageous to the daughters, as it would prolong the period during which their estates would be locked up from alienation, and their issue continue subject to be disinherited by their deaths. That exposition of the will,

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therefore, though more favourable to the wife, is exposed to such formidable objections as respects the daughters that it can have but feeble claims to a preference over the construction which restrains the contingency to the death of the testator ; for if the principle is to prevail that the limitation of the fee to the wife was upon the contingency of the death of the daughters in her lifetime, it would follow that if one of the daughters had married, and afterwards died in the lifetime of the mother and sister, leaving lawful issue, the surviving sister would have taken the estate under the limitation of the will, to the exclusion of the children of the deceased ; and if that surviving sister afterwards died in the lifetime of her mother also, leaving lawful issue, the mother would take the whole estate, to the exclusion of the children of both of the daughters ; and in neither case would the testator's daughters or their offspring ever derive any benefit from his estate, but the whole interest would vest in the widow for her life until the death of the longest liver of the two daughters, and upon that event, in fee.

Can it be believed, that the testator seriously intended thus to cripple the devise to his children, or that it was his will in any case to exclude the issue of that one of his daughters who should happen to die in the lifetime of the other, from the parent's share of the estate, in favor of his surviving daughter, or to disinherit the children of both his daughters for the benefit of his widow ? He has intimated no such intention in his will ; on the contrary, he has vested in his wife an estate for her life, and expressly devised the remainder to his two daughters in fee-simple. These were the two prominent and primary dispositions of the estate on the mind of the testator at the time he framed his will. The limitations over, which follow them, were added to provide for contingencies which the testator anticipated as possible to happen ; in which the leading devises could not take effect according to his declared intention. They carry with them internal evidence, that they were not regarded, or designed as principal devises of the estate which were expected to vest in possession, but as contingent devises over, that might, in certain events, take place. To construe the devise to the daughters, a contingent estate to take effect in the contingency of outliving the mother, but to fail



in the event of their death in her lifetime, would be, to transpose the order of the dispositions made by the testator, and to convert the subordinate and contingent limitation over to the wife into the principal and primary devise. And the legal effect of it would be to vest the remainder in fee in the wife immediately on the death of the testator, subject to be displaced by the contingent fee to the daughters, in case either of them should survive the wife, and such was urged on the argument as the true construction of the will. It was contended, that the devise of the estate was to the wife for her life, with remainder to her in fee, unless the children, or one of them, should survive her; and in that event, upon her death, to the children, or the survivor of them, in fee. But is that construction in conformity with either the letter or the spirit of the devise? In terms, the devise is to the wife for life, and after her death, to the children in fee; and the sense and spirit of that devise assuredly must be to give the estate to the wife for her life only, with a vested remainder in fee to the children; and in the event contemplated by the testator as possible to happen, but in that event only, to limit or devise over to the wife the inheritance primarily intended for the children.

From this view of the subject, it is obvious, that whether the contingency on which the contingent limitation of the fee to the wife is to take effect, be restrained to the lifetime of the testator, or extended to the time of the death of his widow, the intention of the testator must, in certain events, be disappointed, and his bounty turned from the channels in which it was destined by him to flow, to a direction he meant it should never take. No construction involving such consequences can be satisfactory; and it remains to inquire whether the language of the testator, and the rules of law will not admit of an interpretation more conformable to his probable intention.

The contingency is loosely expressed, and its meaning obscure; but looking at the whole context of the will, and considering it in connection with the state of the testator's family at the time, as disclosed in the case, the probable intention of it was to give the estate, after the death of the widow, to the children and their issue; and to provide for the event of the death of one of

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the children, without issue in the lifetime of the other, by the limitation of cross remainders between them; and further to provide for the case of the death of both the children without issue by a limitation of the estate to the widow, in exclusion of the brother and collateral heir of the testator. On that scheme every part of the will would have a substantial and efficient operation, and an effectual disposition be made of the whole estate, without materially infringing the testator's intention in any conceivable turn of events. Thus the widow would hold for her life, and upon her death the daughters, if living, would come into possession of the estate; or if either of them should die before the widow, her issue would represent her, and take her share of the estate. And in default of issue, her share would devolve upon the surviving sister; and in the event of the death of both the daughters without issue, the estate would vest in the widow, and her life estate be merged in the inheritance. To the objection that an ulterior limitation of the fee to the wife, after a devise to the daughters in fee is forbidden by the policy of the law, we answer that the difficulty is obviated by construing the devises of the will to create estates tail in the daughters with cross remainders between them, and an ulterior limitation upon the termination of these estates, to the wife and her heirs in fee. But, whether, the limitation to the surviving daughter and to the wife are by the rules of law to be construed as remainders, or as executory devises, the intention we impute to the testator, upon this scheme for the settlement of his estate would be the same, and would be carried into effect to the extent that the principles of law would permit. Nor would that system be materially deranged by the death of the daughters leaving issue in the lifetime of the testator, for the daughters not dying without issue, the devise over to the wife could not take effect, and the estate admitting it to lapse, would descend to the lawful issue of the daughters, as the heirs at law of the testator. It is true, however, that if one of the daughters happened to die in the lifetime of the testator, leaving issue, and the other daughter to survive him, the lapse of the devise to the daughter so dying, admitting it to lapse, might produce a partial disappointment of the testator's in-

tention, by divesting a portion of the deceased daughter's share of the estate from her own offspring to her surviving sister, when the testator upon the system we ascribe to him must have intended the lawful issue of each daughter, in case of such daughter's death, leaving issue, to be the sole inheritors of the parent's share. But the construction to which we incline, though in that turn of events it might partially fail, would approach much nearer to the accomplishment of the views of the testator, as we understand them, than any other exposition of the will to which our attention has been called, and it is therefore to be preferred. But to effect those objects, the will must be so construed as to restrict the limitation to the death of the daughters without lawful issue; and if that can be taken as the contingency upon which the limitations are to arise, all difficulty will disappear.

Are we at liberty, then, to adopt that construction of the will? The objection is, that we are obliged to supply the words "without issue" by intendment; and it is urged that by such a construction we should express for the testator an intention which he may have had, but which he has not himself expressed; and which, it may be contended, would transcend the power of the court. I fully appreciate the wisdom and binding authority of the maxim, that it is the province of courts to expound the will which the testator makes, and not to make one for him. But whenever a testator expresses himself so obscurely, or employs language of such doubtful import, as to leave his meaning uncertain, courts are driven to the necessity of deciding upon his probable intention, and of expounding his will according to the best lights in their power. The question in such cases is always a question of intent, and it not unfrequently happens, that to give effect to the words which the testator employs in the sense that he is supposed to have used them, other words must be understood to describe and express the disposition he is held to make of the estate. Thus in the familiar instance of the devise to the heirs at law after the death of the wife, a gift to the wife for her life arises by implication, and is engrafted upon the estate which the testator has created. So in a devise to A. and his heir, with a remainder over to a col-

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lateral heir of A., the word heirs will be construed to mean "heirs of the body" without the addition of these words in the will, and the estate of the first devisee will be reduced from a fee-simple to an estate tail. And in the case now under consideration, all agree in this, that to reconcile the ulterior limitation of the inheritance to the wife with the previous devise of the fee to the daughters, the event of the death of the daughters on which the limitation over is to arise, must be taken with some qualification, and understood in a restricted sense. And if the objection to qualify the event of death, by construing it to mean a dying without issue is to prevail, because other words than those that are used must be understood, how can it be admissible to restrain the event to the lifetime of either the testator or his widow, when no words implying any such restriction are to be found in the will? The true rule is, that the probable intention of the testator must be collected from the whole context of the will, according to the judgment of the court which is to expound it; and then the necessary words to express that intention must be understood and supplied by intendment.

Now, in the will before us, the two immediate and principal devises of the estate to the wife for life, and of the remainder to the daughters in fee, are clear and simple, and perfectly intelligible; and of themselves, if they stood alone, would dispose of the whole interest of the testator in the estate: and the limitations to the surviving daughter, and to the wife, when the events on which they are to arise, are ascertained and settled, become equally intelligible. The whole doubt rests upon the contingency upon which those limitations over were intended by the testator to take effect. In resolving this doubt, the court are to preserve the interests created by the express devises of the testator to his wife and children, as far as their preservation is allowed by the rules of law, and may be effected without destroying the ulterior limitations. The legal import of the devise to the daughters is a gift to them and their heirs. By the terms of the first limitation over, as expressed in the will, if one died, the estate was to go to the survivor. To reconcile this limitation with the devise, the event of the death of the daughter must be understood with some qualification;

since the limitation, if upon the event of death simply, which was sure to happen, would turn the previous estate in fee into an estate for life. Why, then, may it not be assumed as the probable intention of the testator, to limit over the estate upon the death of the daughter without lawful issue? The terms must be construed, either as a dying without issue, or as a dying within some limited time; and the qualification of the word "dying," by the words "without issue" is not greater than the restriction of the term by the words "in my lifetime," or the words "in the lifetime of my wife". In each qualification the death of the daughters is preserved as the event on which the limitation is to take effect; the only difference is, that on the one construction, the death is to happen within a limited period, and on the other, it is to take place under the special circumstance of a failure of issue; on principle, that construction is to be preferred which best comports with the previous devise. We have already seen, that by simply restricting the limitation to the death of the daughters in the lifetime of either the widow or the testator, the issue of the daughter, in the event of the death of the parent before the testator, or the widow, as the case might be, would be deprived of the inheritance; and the whole estate would vest, either in the surviving sister or in the widow of the testator, according to the state of things at the time of the death of the parent. But by restraining the limitation to the death of the devisee without issue, the interests of the daughters and their issue to the extent that the rules of law will permit, are protected and preserved, and the devise to the daughters at the utmost, *would be no otherwise impaired* than by reducing it from a fee-simple to a fee-tail.

This comparative view of the legal effect of the two rules of construction appears to me decisive in favor of that which restrains the death of the daughters to a dying without issue, in preference to that which restricts the death to the lifetime of either the testator or the widow. But the construction which adopts the restriction of time to qualify the limitation is beset with other difficulties, which are obviated by qualifying the event of death by the failure of issue. Thus the contingency of the death of one of the daughters in the lifetime of the other, is left at large

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by the will, and its natural limit would be the joint lives of the daughters ; but by restricting the contingency of the death of those devisees to the lifetime of the widow, to whom the fee is in that event limited over, the survivorship between the daughters must have the same limitation ; and the consequence would be, that on the death of the wife, the whole limitation would cease, and the estate of each daughter become absolute, notwithstanding the subsequent death of one without issue, and the survivorship of the other. Again, the limitation over, of the inheritance to the wife was obviously meant to vest in her the absolute fee, and to exclude the lessor of the plaintiff from the inheritance. But if the event on which the limitation of the fee to her is to take effect should be construed to be the death of both the daughters in her lifetime, it is obvious that her death in the lifetime of either must defeat the limitation to her, and let in the *brother* as the heir to the daughters in case of their death, seised of the inheritance, intestate and without issue. Besides, upon that construction of the will, the limitations over, would be executory devisees, and it may admit of a serious question, whether a limitation to the widow after an estate in fee to the daughters, with cross remainders by way of executory devisees would not be void as too remote, unless the limitation was to her for life. But it could not be a limitation to her for life, for she had an estate for life by express devise, and a further devise for life on a new contingency would not enlarge her interest. The intention must have been to give her the inheritance, upon the happening of the event which was to determine the estates of the daughters ; and the condition annexed to the estate, which was in that event to accrue to her, that she should pay one shilling to the brother of the testator, if demanded, conclusively shows that she was to take the fee. These considerations lead irresistably to the conclusion, that the testator could not have contemplated the death of his daughters at any particular period of time, as the contingency upon which the estate devised to them was to go to his widow, but that he must have had in view the death of both without issue ; in which case, unless

some provision had been made by his will to prevent it, the estate would descend to his brother; and the condition of the payment of the trifling legacy to the brother by the wife, in the event of her accession to the inheritance, corroborates that conclusion; for the only reason that can be assigned for that condition is the vulgar notion that a legacy to the heir at law is essential to the validity of a devise which cuts him off from the inheritance. But the testator must have known that he would not be the heir at law, unless the daughters both died without issue; and consequently, the circumstance of his annexing that condition to the devise of the inheritance to his wife, in case of the death of his daughters shows, that the death of the daughters without issue, and the consequent accession of the brother as heir at law, was the event in his contemplation at the time, and intended by him as the contingency upon which the limitation to the wife was to take effect. If, then, this intention is thus clearly discoverable from the will itself, taken in connection with the state of the family of the testator as disclosed in the case, and if that intention is in itself so just and reasonable, it would be greatly to be lamented, if the will could not be so construed as to give it that effect, especially as any other construction is seen to produce results which the testator could not have intended. My own reflections have satisfied me, that we shall contravene no principle of law, and violate no rule of construction by the exposition of the will to which I incline, and the authorities which bear upon the point appear to me to authorise that construction.

In the case of *McClintick and others v. Manus* [4 *Munford*, 328.] where the limitation was upon the contingency that the devisee should die, the Supreme Court of Appeals of the State of Virginia determined that the event contemplated was a dying without issue, which created an estate tail in the devisee. In that case the testator, among other bequests and devises, devised to each of his sons a tract of land, which were held to be devises in fee, and to each of his daughters a pecuniary legacy, and the will contained a limitation to the following effect: "If it should please God, that

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any of my sons should die, their part or parts to be equally divided among the rest of their brothers ; and likewise with my daughters in case any should die." One of the sons died under age, intestate and without issue, and the court was of opinion that the event contemplated for the limitation to take effect, was not a dying merely, because that is a certain, and not a contingent event ; nor was it a dying without heirs, for that could never happen so long as any of the devisees over, or their issue, were living. That the event contemplated, therefore, was a dying without issue, which created an estate tail in the first devisee, and being enlarged by statute into a fee, enured to the female appellants as a part of the heirs of the deceased son. It was contended in that case, as in this, that the limitation to the *rest of the* brothers operated by way of executory devise, on the principle of being a contingency to happen in the compass of the lives of the brothers. But the court held, that the limitation over to the brothers was not good by way of executory devise on that principle, because the last clause of the will enlarged the devise to the sons into estates in fee ; and the limitation over, consequently, was to the brothers and their heirs.

The principle of the case of *M'Clintick v. Manus*, is sanctioned by the decision in the case of *Spalding v. Spalding*, Cro. Ch. 185. In that case the testator devised the land in question to John, his eldest son, and the heirs of his body after the death of Alice, the devisee's wife ; and if John died, living Alice, that William, another son of the devisee, should be his heir. John died leaving issue a son, in the lifetime of Alice, the widow ; then Alice died, and William entered upon the son of John ; and the question was whether his entry was congeable ? It was urged by William, the ulterior devisee, that as John, the first devisee, had died in the lifetime of Alice, the contingency had happened upon which the limitation to him was to take effect. But it was adjudged by all the court, upon the whole context of the will, that it was to be construed according to the intent of the party, and that the construction should be, that if John die without issue, living Alice, then William, the younger son should have the estate ; and that the testator having limited it first to John and the heirs of his body, it should not be construed that if John died, living



Alice, that William should be his heir, John having issue, and thereby to disinherit the heirs of John's body. It is true, that reference was had to the devises in the same will to the other children, and a general devise over of the whole estate, in case of the death of all the children without lawful issue, as manifesting the intention of the testator. But the material words "without issue," which determined the character of those limitations, did not appear in the limitation over of the estate devised to John in the contingency of his death in the lifetime of Alice. And the court supplied those words, as necessary to express the probable intention of the testator because the issue of the devisee must otherwise have been disinherited, which could not be the intention of a testator, who first devised the estate to John and the heirs of his body. This rule of construction has been repeatedly recognised and confirmed. Thus, in the case of *King v. Mellen*, (*Ventris*, 225.) Chief Justice Hale, who pronounced an able opinion, which, though then overruled by his associates, ultimately prevailed, refers to Spalding's case with approbation, and observes, that it was strongly urged in that case, that the estate of the first son should cease, for being said, if he died, living the wife, this was a correction of what went before. But it was ruled by all the court that it was an absolute estate tail in the son, as if the words had been, if he died without issue, living the wife, because the testator could not be thought to intend to prefer the younger brother to the issue of the eldest. This comment by so able a jurist sufficiently illustrates the principle of the decision, and sanctions its authority.

So in the case of *Kentick v. Newman*, where the sum of £200 was by articles before marriage agreed to be laid out in land to be settled on husband and wife for life, remainder to the heirs of their bodies, remainder to the husband in fee; but if no settlement made during the joint lives, then the £200 to be to the sole use of the wife, if living; but if she should die before her husband, then the £200 to go to her brother and sister. She died before her husband, leaving issue of the marriage, a daughter. The question was, whether the £200 should go to the wife's brother and sister, or to her

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daughter. According to the letter of the articles it would go to the brother and sister; but the court decreed it to the daughter, for that the intent of the articles was to provide for the wife and the issue of the marriage, and not for the brother and sister of the wife. It was observed, that it could not be intended that the wife ever thought of preferring her brother and sister over her own child; and though the words were, if the wife should die, living the husband, then the £200 to go to the wife's brother and sister, yet they must be construed to mean, if the wife should die without issue. In that case reference was made to the case of Spalding v. Spalding, as a case in which the court, to effectuate the intention of the testator, had supplied the words "without issue," because it could not be intended that the testator would prefer the second son before the issue of the eldest.

These cases show that courts, in expounding devises of real estate, proceed upon the principle that when there is an express devise in fee, or in tail, the issue of the devisee shall not be disinherited by a limitation over, purporting in its terms to be upon the death generally of the devisee. But such limitation, to preserve the inheritance for the issue, shall be construed to be upon the contingency of the death of the first devisee without issue.

Why is not this court at liberty to apply that rule to the construction of this will? The facts clearly bring the case within the principle; and the reasons given for the rule in other cases apply in their full force to this. For this testator first devised the estate to his two daughters in fee-simple, after the death of his wife; and it is most improbable that he should intend by the devise over of the inheritance to the wife, upon the death of the daughters, to disinherit the issue of the daughters for whom the first devise of the fee would otherwise provide. And if in the case of Spalding v. Spalding, where the limitation over was to a younger brother, upon the event of the death of the son to whom an estate tail had been expressly devised, in the lifetime of the widow, the court were at liberty to construe the contingency to be the death of the son without issue, because the issue of the

son would otherwise be disinherited contrary to the intention of the testator. It cannot *surely* be going too far in this case, where the limitation over of the inheritance is to the testator's wife, to whom an estate for life in the land had already been devised, upon the event of the death of the testator's children, to whom an estate in fee had been previously given, to construe the contingency contemplated by the testator, to be the death of the daughters without issue; since, upon either of the other constructions sought to be put upon the will, the issue of both the daughters, in the event of their death in the lifetime, in the one case, of the testator, and in the other, of the widow, must be disinherited. But it is contended, that if the limitations are upon the contingency of the death of the daughters without issue, the consequence will be, that the first limitation between the daughters, being a devise of the property in case of the death of one of them without issue, to the other, must upon the authority of the case of *Jackson v. Anderson*, [16 *Johns. Rep.* 383.] be construed to depend upon the contingency of the death of her who should first die without lawful issue, living at the time of her death, and that the devise over upon that event was a limitation over as an executory devise to the survivor, and that the ulterior devise to the wife would be too remote to be valid.

The case of *Jackson v. Anderson* arose upon the will of Medcef Eden, by which will the testator devised certain real estate to his son Joseph, his heirs and assigns, and other real estate to his son Medcef, his heirs and assigns, and declared that it was his will, that if either of his said sons should depart this life without lawful issue, his share or part should go to the survivor, and in case of both their deaths without lawful issue, then he gave all the property to his brother John Eden, and his sister Hannah Johnson and their heirs. Both sons survived the testator, and Joseph afterwards died without issue, in the lifetime of Medcef, and the suit was brought by Medcef for premises devised to Joseph, against the purchaser under a judgment against Joseph. The question was, whether the devises to the sons, with the limitations over, created estates tail in the devisees, with cross remainders, or whether Joseph took an estate in fee, with a limita-

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tion over, by way of executory devise to Medcef. And it was decided, that the devise to Joseph, with the limitation over to Medcef, did not create an estate tail in Joseph, but that the devise over, upon the event of his dying without issue, was a limitation by way of executory devise to Medcef, the survivor. In the decision of that case, great stress was laid upon the express limitation to the survivor of the two sons of the testator.

And the court in the subsequent case of *Lion v. Burtis*, which arose upon the other branch of the limitation in the same will, in substance declared the general rule to be that a limitation of real estate, on a dying without lawful issue, where there are no other words restrictive of the operation of those terms, is to be construed an indefinite failure of issue, and creates an estate tail in the first taker. The decision in *Jackson v. Anderson* is an exception to the rule, and rests in a great degree upon the force of the term survivor, which was held to denote an intention of the testator to limit the failure of issue to a life in being.

The case of *Lion v. Burtis*, [20 *Johns. R.* 483.] arose upon the death of Medcef Eden, the surviving son of the testator without issue, and involved the consideration of the nature, and extent of the estate of Medcef at the time of his death; and the legal operation of the limitation over to the testator's brother and sister, which then for the first time came under judicial review. And it was adjudged that Medcef, upon the death of his brother Joseph, became seised of the estate in fee tail, with a remainder in fee-simple, to the brother and sister of the testator, and the judgment of the Supreme Court was affirmed, in error. One ground of the decision was, that the executory devise which had been adjudged by the prior decision to have subsisted between Joseph and Medcef, ceased upon the death of Joseph, because the estate then vested in possession in Medcef. But stress was also laid upon the difference in the phraseology of the limitations to the survivor of the sons, and to the brother and sister of the testator. Thus, it was observed by the Chief Justice, in giving the opinion of the Supreme Court, that the devise over to the brother and sister omitted the word survivor, which was considered very significant and important in showing the intent

of the testator, when he gave the estate to his surviving son, in case the other died without lawful issue. And the Chancellor, in his opinion, in the court for the correction of errors, observes, that the use of the word survivor in the first limitation, and the absence of that term, or any words of similar import in the last, formed a strong distinction between the two devises, and that the court in deciding that the estate of Joseph was not a fee tail, by no means determined that the estate of his surviving brother was not such an estate.

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These cases upon the will of Eden, therefore, taken together, appear to me to oppose no obstacle to our construction of the will under consideration. In this will the devise to the two daughters is in fee; and the ulterior limitation to the mother is upon the death of both of them, (as we construe the contingency) without lawful issue; upon that limitation the question in this case arises. It is clear that the estates of both the daughters must terminate before the ulterior devise to the mother can take effect, and it is equally clear, that to give opinion and validity to the devise over to her, the preceding estate of the daughters must be held to be in fee-tail. And unless the terms of the first limitation between the daughters precludes it, that construction ought to prevail, as it so fully effectuates the manifest intention of the testator, in favor of the declared objects of his bounty. Now the devise over upon the death of one of the daughters to the other, is not in express terms, nor, as I conceive, by necessary intendment, to the surviving daughter. The words are, "if one of them should die, the property to descend on the other;" and these words, understanding the testator to refer to a dying without lawful issue, do not necessarily restrict the contingency to any particular period of time, but more properly import a failure of issue, whenever it may happen, as the contingency upon which the estate is to go over. It is more analagous to the case of *Holmes v. Meynel*, [*T. Ray*, 452.] than to that of *Jackson v. Anderson*. For the case of *Holmes v. Meynel*, the devise was to the daughters of the testator and their heirs, equally to be divided between them; and in case they should happen to die without issue, a devise over to F. And the court held that the daughters took several estates

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tail, and when the issue of either should fail, the other would take by way of cross remainder in tail. So in the case now under consideration, the devise, as we understand it, is to the two daughters in fee, and if one of them should die without lawful issue, the state to descend, or accrue to the other; by which devise, the daughters, upon the principle of the last cited case, took estates tail, with cross remainders in tail, upon the failure of issue; and upon that construction, the ulterior limitation to the mother was in fee, upon the termination of the estates tail, of the daughters, and all the provisions of the will would have their effect, and be satisfied.

But it was said, that if the limitation in question created estates tail in the daughters, the statute turned them into estates in fee-simple. If those estates had fallen into possession, and the daughters, or either of them, had become seised in fee tail, such might have been the consequence. But the provision of the statute is, that when any person would, if that statute and the act to which it refers, had not been passed, have become seised, in fee tail of land, &c. by virtue of a devise, &c. such person, instead of becoming seised thereof, in fee tail, shall be deemed and adjudged to become seised thereof in fee-simple, absolute. In this case there was no previous estate for life, in the widow, and the devise of the estate tail to the daughters was in remainder. They could not become seised of the land in fee tail, until the death of the widow, and the estate tail could not, during the existence of her life estate, and before the daughters became seised of the land, be converted by the statute into a fee simple.

I have not entered into an examination of the cases cited by the defendant to show that the contingency, upon which the limitation of the fee to the wife was to take effect, is the death of the daughters in her lifetime. But it may be proper to observe that in those cases, the limitation to the ulterior devisee was upon a contingency expressly declared by the testator, or resulting by necessary intendment from the will; and no room was left to the court for construction. The rule that no implication shall defeat an express limitation applied, and the court was bound to

give effect to the will of the testator, when clearly expressed, however hardly it might bear upon the natural objects of his bounty. But when, as in this case, the intention is to be collected from uncertain, obscure, or imperfect expressions, the court look to the probable intention of a testator in such circumstances; and never admit a construction by implication which operates to disinherit an heir, or to exclude the children of the testator or their issue, unless from necessity.

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Judgment for the defendant.

[R. Lockwood, atty. for plff. J. Anthon, atty. for defl.]

NEAL MCGEEHAN *versus* BRIDGET M'LAUGHLIN.

In assigning breaches, in an action of covenant, it is sufficient, in general, to follow and negative the words of the instrument declared upon.

Covenant, upon a special agreement, for the use and occupation of a house during the term of three years. In addition to other and ordinary stipulations, the instrument provided, that the defendant should pay the plaintiff "for all necessary repairs put upon the premises" during the term aforesaid. The breach assigned in the declaration was, that "the defendant did not, nor would, "after the said agreement, and during the said demise, and "whilst she was possessed of the said demised premises, with the "appurtenances as aforesaid, pay, or cause to be paid, to the said "plaintiff, the repairs that became and were necessary to the said "premises, and that were made upon the said premises, by the "said plaintiff, after the making of said deed."

The defendant demurred to the declaration, and Mr. J. Anthon, in support of the demurrer, contended, that there was nothing in the breach assigned to show that the defendant had not kept her covenant. [He cited 1 Esp. N. P. pt. 2. p. 158. 3 Caines' R. 196. Treadwell v. Steel, Marston v. Hobbs. 2 Mass R. 433.]

Mr. D. Graham, contra, for the plaintiff, contended, that the

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breach being assigned by negating the words of the covenant was sufficient, and in accordance with the general rule of pleading. [*He cited the case of Marston v. Hobbs, and Muscott v. Bartlett, Cro. Jac. 369.*]

II. If the breach is not sufficiently assigned, the objection is not available on general demurrer. [*Steph. on pl. 159. 162.*]

JONES, Chief Justice, delivered the opinion of the court. This is a general demurrer to a declaration in covenant, by the lessor against the lessee, upon an indenture of lease, for not paying the plaintiff for necessary repairs put by him upon the premises, and which the defendant was to pay for according to the terms and effect of the covenant of the defendant, the lessee, in the lease contained.

The objections taken at the bar to this declaration, in support of the demurrer are, that it does not appear by way of allegation or averment, that any repairs were necessary, or that the plaintiff either made any himself, or paid for the making of any repairs whatever. The defendant contends that it was optional with her, by the covenant, to repair the premises, or pay for the repairs of them, but insists that if her obligation was to pay for repairs to be made by the plaintiff, the declaration ought to show clearly that repairs were necessary, that the plaintiff made them, and what they cost him.

The declaration states the covenant to be, that the defendant should pay the plaintiff for all necessary repairs put by him upon the premises, and avers that the defendant entered in and upon the demised premises, and was possessed thereof under the lease, and that she did not, during the demise, and whilst she was possessed of the premises, pay, or cause to be paid to the plaintiff the expense of the repairs that became and were necessary to the premises, and that were made upon them by him after the making of the deed. This assignment of the breach, the plaintiff alleges to be sufficient on the ground that it is in the words of the covenant. The sufficiency of such an assignment, as a general rule, is not denied; but the defendant contends, that this is not a case for the application of the rule, and insists that an assignment in these general terms



does not show a breach of the covenant. If the assignment in its present form does not show a breach which entitles the plaintiff to damages, the demurrer is well taken. Under the general rule the breach would be sufficiently assigned by negating the words of the covenant, and the exception is of cases where such general assignment does not necessarily amount to an averment of a breach of the covenant, but further averments are necessary to show that the covenant has been broken; and in these cases the breach must be specially assigned. If, then, the general assignment in this case does necessarily import a breach of the covenant it is sufficient, and no further, or more special averment or allegation was required. Now, the covenant was to pay for all necessary repairs put upon the premises by the plaintiff: the breach the plaintiff assigns is, that the defendant has not paid him, (the plaintiff) for the repairs that became and were necessary, and were put upon the premises by him. Does not this general assignment necessarily amount to an averment of a breach of the covenant by the defendants? The covenant stipulates that he would, and the assignment of the breach denies, that he did, pay for the necessary repairs put by the plaintiff upon the premises. The faults imputed to the assignment are, that the pleader does not specially, and in express terms aver that repairs were necessary, and were made by the plaintiff, and show the amount of the cost of them to him. These specifications of the charge made by a general assignment which imports a breach of the covenant, are not required to be set forth in the declaration, but are necessarily implied in the averment of the breach. The rule which allows an assignment of the breach in the words of the covenant, or by negating the performance of the agreement, according to the stipulation of the party in the deed, necessarily excuses the pleader from the obligation to specify the particulars, or set forth the matters at large which constitute the breach. To require a specification of the particulars of the breach, would be to abrogate the rule, and to hold the general assignment insufficient. But if the general rule is to be observed, and the allegation and charge of the non-payment by the lessee upon request for the necessary repairs put upon the premises by

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the lessor, necessarily implies the fact that repairs were necessary, and were put upon the premises, and imputes to the defendant a breach of her covenant to pay for them, then this declaration cannot be demurrable, or certainly cannot be questioned upon *general* demurrer, which to prevail must be for defects in matters of substance.

To sustain the general assignment it will be incumbent on the plaintiff to show, that repairs were necessary, and were put upon the premises by him; and to give the jury a measure of his damages, he must also show the amount of his expenditure in making them. But these are matters of evidence to be shown at the trial in support of the action. They are not necessary to be superadded to the general assignment in the pleading, and so far as any averment of them is requisite, it is in substance made in the general assignment itself, for the averment that the defendant did not, and would not pay for the repairs that were necessary, and were made upon the premises by the plaintiff, is in substance an averment of the fact that repairs were necessary and were made. And if these facts are necessarily included in that general averment, a distinct and substantive averment of them could not be necessary.

The case of *Treadwell v. Steele*, [*3 Cairnes' R.* 169.] on which the defendant relies, differs essentially from this, but the principle of it illustrates and confirms the rule which applies to this. In that case the covenant was, not to cut, or carry off, or suffer others to cut, or carry off any timber, but from the lands which then were, or should thereafter be cleared. The plaintiff assigned his breach that the defendant did cut and carry off, and suffer divers others to cut and carry off from the premises, other than such parts of the same as the defendant had, or yet has cleared, divers large quantities of timber, &c.; and the court held the breach was bad, because the cutting might be from places cleared by others, and not by the defendant. Hence it was that the fact assigned for the breach of the covenant might be true, and yet the defendant might under the covenant have lawfully taken the timber, as it might be taken from land cleared by others, the covenant not restricting the defendant from cut-

ting, or taking timber from any land then, or thereafter to be cleared.

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This case then aptly exemplifies and confirms the rule, that an assignment in the words of the covenant which shows a breach is sufficient, but that it must show a breach, or it will be bad. If the breach had been assigned in the words of the covenant, and the cutting alleged to be on lands other than such as had been cleared, in general terms without limiting it to land which the defendant had himself cleared, no objection could have been taken to its sufficiency. The example given in *Espinasse* of the exception to the rule which allows an assignment in the words of the covenant furnishes a further illustration of the rule itself.

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But it is said, that in this case, it was optional with the defendant to repair herself, or to pay for the repairs. I see no ground for the pretension; there is no option given to the defendant to repair herself. The stipulation is to pay for the repairs to be made by the lessor, who has chosen to see to those repairs himself, and to exact from the defendant a covenant to pay him for them. The actual repairing by the defendant might have satisfied the covenant, but the plaintiff was not bound to wait for her to repair. He had a right to make the repairs himself, and then call upon the defendant to pay for them. We must intend that he has done so, and that the defendant has violated the terms of her covenant by not paying him the expense he has incurred thereby. We think the breach well assigned, and the plaintiff must have judgment on the demurrer.

Judgment for plaintiff, with leave to the defendant to withdraw the demurrer on payment of costs.

[J. R. Whiting, atty. for def't. D. Graham, atty. for plff.]

*Note.*—The following cases may be referred to on this subject: *Abbot v. Allen*, 14 J. R. p. 248.; *Juliand v. Burgott*, 11 Johns. R. p. 6. and the notes to that case. *Fletcher v. Peck*, 6 Cranch, p. 127.; *Esp. N. P.* vol. 1. p. 298. and the cases there cited.

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JOHN PATTEN and SMITH CUTTER, *Bail of BENJAMIN A. JOSLIN, ads. JOHN STEWARD, Jr.*

There is no distinction between proceedings against bail and other joint debtors, and the plaintiff may proceed and declare against both, under the statute, as in ordinary cases, where one defendant is taken and the other not found.

Where, therefore, in an action upon a recognizance the sheriff had returned upon the writ, one of the defendants taken and the other not found, and the plaintiff under the statute relating to joint debtors, declared against both bail, and a motion was made in the name of the defendant not taken, to enter an *exoneretur* upon the bail piece in the original suit, with the avowed object of making it available to both, *the motion was denied.*

The *rights* of the bail to discharge himself by a surrender of his principal ends with the return of the *ca. ss.* in the original suit, and the eight days is matter of grace rather than of right.

Mr. SELDEN, in behalf of Patten, one of the defendants in this cause, moved that an *exoneretur* be entered on the bail-piece. He read an affidavit stating, that a suit had been commenced against the bail in which the *capias ad respondendum* had been returned, one defendant taken, the other not found. The plaintiff upon this return had, under the statute relating to joint debtors, (1 R. L. 321.) declared and proceeded against both the bail. In behalf of the defendant not taken, he now moved for an *exoneretur* on the bail-piece in the original cause, with the avowed object of making it available to *both*. He cited *Col. Cas. p. 56.* and contended, that although, if the plaintiff had commenced several suits against the different bail, he might have fixed one, or both of them separately, yet, having proceeded against the two in one suit, the right of surrender enured to both. [*Dunlap*, vol. 1. p. 205.]

*Mr. E. Curtis* and *Mr. D. B. Tallmadge*, contra. They read an affidavit showing that on the return day of the process against the bail, the principal arrived in town, stopped at the house of Patten, one of the bail, and had ever since resided there with him.

In reply to the case cited they remarked, that under the return to the *capias* in that cause the plaintiff could not proceed against

both bail. It was a defective return, being silent as to one defendant. The plaintiff in that case elected not to proceed against the bail taken under the provisions of the statute concerning proceedings against joint debtors, but had issued fresh process to bring in the bail not taken on the *capias* first issued; and before the return day of the last *capias*, the bail last taken applied for an *exoneretur*. The bail *last taken* was in that case entitled to an *exoneretur*; and as the plaintiff was seeking to charge the bail *jointly*, the surrender of the principal discharged the joint liability of the bail. But in this case, although the process was against both Patten and Cutter, yet upon the return of *non est*, as to Cutter, they had proceeded to judgment against Patten alone, and he was therefore fixed. Bail are only relievable as matter of grace, not of right. [*Arch. Prac.* p. 9. 1 *Wendell's Rep.* p. 50.]

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*Selden*, in reply, remarked that if this motion were denied, the effect to the defendant not taken in cases where the bail had joint property (which was the fact also in this case) would be the same as if the motion were denied as to *him*, when made within eight days after the return of a *capias* in a separate suit against him.

*Per Curiam.* This is an application to enter an *exoneretur* on the bail-piece; and the question is, whether the bail, by surrendering their principal, can now be exonerated, the time for surrendering having expired. The case of *Ballard and Parkman ads. Kibbe and Ludlow*, (*Col. Cas.* 56.) cited in support of the application, is quite distinguishable from this. There the sheriff's return was defective; and *Parkman*, one of the defendants, had endorsed his appearance on the *capias* two days after the return day; while the other defendant, *Ballard*, was arrested by the sheriff on a *testatum capias* against him alone, and made returnable in Jan. 1798. But he surrendered his principal in behalf of himself and his co-bail before the return day of the *testatum capias*. The declaration was not filed until Feb. 10, 1798; and the court held, that the surrender was regular as to both, no declaration having been filed, or proceedings had against

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the defendant who endorsed his appearance, until the arrest of his co-bail.

The rule is, that the bail are entitled to eight days entire, where the process is against both, but the return must be complete. Here the plaintiff elected to proceed upon the first return without suing out an *alias* against the defendant not taken, and filed his declaration; and there is no distinction between proceedings against bail and other *joint debtors*.

Both bail are bound for their principal, and the plaintiff has a remedy against them jointly and severally. He may proceed, therefore, either against both or one. Patten, the defendant who now applies for relief, has had every opportunity to exonerate himself by surrendering his principal, and has failed to do so. This was his own fault, and he is now fixed. The right of the bail to discharge himself ends with the return of the *ca. sa.* against his principal; and the eight days is matter of grace rather than of right.

This motion must be denied; but the bail not taken has liberty to make such application to the court as his case may require.

Motion denied.

[D. Selden, *attys. for deft.* E. Curtis, *attys. for plff.*]

AUGUSTUS LAURENT

versus

THE CHATHAM FIRE INSURANCE COMPANY  
of the City of New-York.

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A building erected upon a lot of land in the City of New-York, by the plaintiff, who had leased the same for a term which was to expire on the first of September, 1827, was insured by the defendants to the amount of \$800. The lessee had the power of renewing the lease on its expiration, or of removing the building from the premises at his option. The building, if suffered to remain, was worth about \$1000, but if removed not more than \$200. It was destroyed by fire, on the 15 of August, 1827, at which time the lessee had given the lessor no notice of any intention to renew the lease. *Held*, nevertheless, as the building at the time of its destruction was worth \$1000, as it stood upon the premises, that the plaintiff was entitled to recover the full amount of his insurance upon it.

*THIS* was an action of assumpsit on a policy of insurance against fire, upon a certain building in the City of New-York, upon which the defendants had underwritten to the amount of eight hundred dollars.

The defendants pleaded the general issue; and the cause was tried before Mr. Justice Hoffman on the 11th day of July, 1828.

At the trial the execution of the policy, and the delivery of the preliminary proofs to the defendants, on the 26th day of September, 1827, were severally admitted, and the plaintiff then proved that the premises insured were destroyed by fire on the 15th day of August of the same year. He also proved, that the building insured was erected by himself at an expense of \$1100 and upwards, and that it was actually worth at the time of its destruction, more than the sum insured upon it. The building was erected for, and used as a cow-house or stable, with a grocery store at one end of it, *and had no foundation fixed in the ground.*

The plaintiff having here rested his cause, the defendants proved that the said building was erected on a lot of ground which was the property of Mr. John R. Livingston, who had demise the same to the plaintiff for a term which expired on the first day of September, 1827, by a regular written lease, contain-

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ing a covenant for its renewal. Mr. Livingston being examined as a witness, testified that the plaintiff had not given notice of his desire to renew the lease under the covenant, and that the lease had not been renewed. He also stated, that he had agents who attended to the management of his property in that part of the city where these premises were situated, and he could not say what arrangement had been made between his agent and the plaintiff relative to the lease. He also testified, that he had no interest in the building destroyed, and had so informed the attorney of the defendant when called upon by him after the fire.

The plaintiff then called a witness as to the value of the premises, who testified that the building insured was worth about \$1000, but that it probably cost more than that sum. If, however, it were necessary to remove the building, the witness said he would not give more than \$200 for it.

Upon this state of facts, the counsel for the defendants submitted to the presiding judge, that, in as much as the plaintiff had no interest in the lot on which the building was erected, except during a term of which only fifteen days remained at the time of the fire, and in as much as the value of the building if removed was only \$200, the plaintiff could not be entitled to recover \$800, as an indemnity for his loss.

But the judge ruled, that as it had been proved that the building had cost the plaintiff upwards of \$1100, and was worth at the time of its destruction, according to the testimony of all the witnesses, at least \$1000, and as there were several vacant lots in the immediate vicinity upon which it might have been placed, even if the plaintiff had not renewed his lease under the covenant; and in as much also, as the defendants must be presumed to have made the insurance in question with a knowledge of all the circumstances, the plaintiff was entitled to recover the full amount insured, together with interest on that sum. To this opinion the counsel for the defendants excepted.

The jury returned a verdict for \$800 in favor of the plaintiff. The defendants now moved for a new trial, and Mr. Jay, in support of the motion contended, that the question, as to the loss,



ought to have been submitted to the jury. The contract, he insisted, was a contract of indemnity merely, and if the plaintiff's property was not worth to him at the time of its destruction more than two hundred dollars, he could not recover beyond that sum, even if the building were intrinsically worth eight hundred dollars when suffered to remain upon its foundation.

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The true question was, as to the value of the building to the plaintiff under all the circumstances of the case? It was erected upon leased premises, and if removed, three-fourths of its value would be destroyed. The lease, it was true, contained a covenant whereby it might have been renewed upon certain terms, but there was no proof of any agreement or arrangement for its renewal. The case stood then as if the plaintiff were obliged to remove his building at the expiration of his lease; and in that event it was clearly proved that the property would not have been worth more than \$200. The jury having, therefore, found too large a sum by their verdict, there ought to be a new trial to rectify their mistake.

*Mr. Charles Graham*, for the plaintiff, *contra*, contended,

1. That the policy was to be considered as a valued policy, and the insurance being for a limited time, a loss of the interest of the assured within that period, constituted, under the circumstances of the case, a total loss.

He admitted that the policy was a contract of indemnity, and that it ought to be construed liberally, so as to meet the intentions of the parties. [2 *Con. Mar.* 788.] But here the jury actually passed upon the damages sustained by the plaintiff, and their verdict ought not to be disturbed. The defendants fixed the amount which they were willing to underwrite upon the building, and they could not now be permitted to controvert it, by proof which was merely speculative upon its value.

The building was intrinsically worth more than the sum insured, and the defendants could not assume that within a given period, the plaintiff would have been compelled to incur expenses, in relation to it. It is enough, that the building was worth the amount of the verdict, and that is the measure of the plaintiff's loss. It is a common practice in New-York to insure buildings

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erected on property leased for a limited term, and by analogy to marine policies the defendants were bound to pay the whole value of the building. [9 *Mass. Rep.* 85. *Phillips on Ins.* 162. 11 *J. R.* 358. 1 *J. Cas.* 141. 2 *Atk.* 554.]

JONES, Chief Justice, delivered the opinion of the court.

This was an action upon a policy of insurance in the usual form, against loss and damage by fire.

The policy and preliminary proofs were admitted, and it was proved that the building covered by the policy was destroyed by fire, within the term for which the same was insured, and the question turned upon the amount which the assured was entitled to recover.

It appeared in evidence that the building stood upon a lot of ground in the City of New-York, which belonged to J. R. Livingston, who had leased the same to the plaintiff for a term, which expired on the first day of September 1827, and that the lease contained a clause, entitling the lessee to a renewal upon the terms expressed therein.

The lessor, who was called as a witness, testified that the lease had not been renewed, and that the plaintiff had not given any notice of his desire to renew the same ; but he further stated, that the management of the property was under the charge of agents, and he could not say what arrangements might have been made in relation to the renewal of the lease. The premises consisted of a cow-house or stable, which stood on the surface of the lot, without any foundation sunk or fixed in the ground, and in one end of which there was a grocery. The building was erected by the assured himself. It cost about \$1100, and was at the time of its destruction by the fire worth more than the sum insured upon it. The testimony was, that as it stood upon its location at the time of the fire, the value of it was about \$1000 ; but one witness for the defendants stated, that if it had been necessary to remove it from the lot, he would not have given more than \$200 for it.

Upon this testimony the question was, whether the assured was entitled to recover the whole amount of the sum insured, the

same falling short of the intrinsic value of the tenement, or whether he was to be restricted to the \$200, as the value of it under the circumstance of its being to be removed from the premises. The judge held him entitled to recover the full amount of his insurance, and we are now to decide upon the soundness of that opinion.

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The claim is by the lessee, upon a contract for insurance against loss and damage by fire, to a building erected by him upon the leasehold premises; a total loss has happened by fire during the term for which the premises were leased; the value of the building at the time of the loss exceeded the sum insured upon it, and the assured is therefore entitled to the full amount of the insurance towards his indemnity, unless the objection of the defendants is to prevail. The defendants object that the term was about to expire, and no notice had been given of an intention to renew the lease, that the building was therefore to be removed, and that the value of it subject to removal is the measure of the loss, and the amount to be recovered as an indemnity.

It is certainly true, as a general rule, that the policy of insurance is a contract of indemnity, and that the actual loss upon an open policy is the measure of the indemnity to which the assured is entitled. But will that rule, if applied to this case, sustain the defence? The plaintiff insists that this is not an open policy; and if he is correct in that opinion, and the contract is to be deemed a valued policy, there could be no longer any question of his right to recover to the full amount of his insurance. But I cannot accede to that opinion. The cases to which we are referred for the support of it, so far from sustaining the proposition, are decisive against it, and proceed upon the basis that insurances against loss by fire are open policies upon interest, and protect the assured to the extent only of his insurance on his interest in the premises.

In the two leading cases [*Lynch and another v. Dayrell, and another, 3 Bro. Parl. Ca. 497. and the Sadlers' Com. v. Badcock and others, 2 Atk. 554.*] it is held, that policies against fire are not insurances of the specific things mentioned to be insured, and which attach to the realty or pass with the same as incident

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thereto by assignment, but that they are special agreements with the persons insured, against such loss or damage as they may sustain by the destruction or partial damage of the thing upon which the insurance is predicated ; and it follows, that the party for whom the insurance is made must have an interest in the premises at the time of the insurance, and at the time of the loss, or he can sustain no loss against which the contract will entitle him to indemnity : but it does not follow as a consequence of that attribute of the contract that the policy must be a valued policy ; or, in other words, that the sum in which the owner is insured is the sum which he will, in case of a total loss, be entitled to recover. The reverse would be the more natural inference, that the recovery of the assured must be regulated by the value of the property : for if the policy be a personal agreement to indemnify him against loss or damage, his claim will be satisfied by the reimbursement to him of the actual value of the property at the time, which is the true amount of his loss by the peril, and such I understand to be the doctrine of those cases. In both of them the policy is held to be a contract to make good the loss which the contracting party himself should sustain ; but no intimation is given of the right of the assured to the specific sum mentioned in the policy in the case of a total loss, as liquidated damages, or an agreed indemnity. On the contrary that sum is treated as the extent of the insurer's liability, and not as the measure of the assured's claim. The same language is spoken by the policy before us. The assured is, by the terms of the contract, insured against loss or damage by fire to the amount of \$800, on the building described in the policy. The insurance is against the loss or damage which the party interested in the premises may sustain, whatever the loss or damage may be, provided that it does not exceed \$800, to which the indemnity is limited. It is not a contract to pay that sum in case of loss, nor a stipulation that the value of the premises shall, in such case, be estimated at that sum. The undertaking is to pay the amount of the actual loss or damage, but with the restriction of the amount of the payment to the sum mentioned in the policy. This intention of the parties is not left to the construction of the terms in which the premises are expressed to be

insured. The specific agreement of the company which immediately follows in the next clause of the policy fully explains the sense in which the previous terms are used. By that agreement the company promise and agree to make good to the insured, or his personal representatives, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property specified in the policy during the continuance of the insurance, the loss or damage to be estimated according to the true and actual value of the property at the time the fire shall happen. These stipulations are general, and apply equally to every species of loss or damage, total as well as partial, ~~the~~ and exclude all pretension to the claim of the sum mentioned in policy in any case as a valuation of the subject of the insurance, or as liquidated damages recoverable by the insured. The printed conditions annexed to the policy, and declared to be explanatory of the meaning thereof requiring the persons sustaining loss or damage by fire, to give notice thereof to the company, and to deliver in a particular account of such loss or damage, signed and verified by oath, and supported, if required, by the books or proper vouchers, conclusively show the contract to be understood by the parties as an open policy, and conclude the assured from claiming satisfaction beyond the actual value of the property he loses by the fire at the time of the loss.

The same principles apply to marine insurances. The policy is a personal contract, and when made on the assured's own account, the terms of it are that the assured causes himself to be insured, and makes insurance in a given sum, for a specific voyage, or term of time upon the ship or the goods on board of her, against the perils of the sea, and other enumerated risks. And the policy in this form, thus clearly resembling that of the fire policy now before us, is always understood, and held to be an open policy, and to entitle the insured in case of loss, whether total or partial, to an indemnity and recompense to the amount of his actual loss by the perils from which the contract professes to protect him. There may be insurable interests, such as profits in the case of *Mumford v. Hallet*, [1 *Johns. Rep.* 433.] for example, which must of necessity be regarded as valued at the amount insured upon them. And in such cases the policy must

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be considered a valued, and not an open policy ; but there are exceptions to the rule. To make the contract a valued policy, and substitute an agreed valuation of the ship or goods insured for the actual value of them, to be ascertained by proof, as the rule of damages, or measure of the indemnity in case of loss, a special agreement of the parties is as a general rule, required ; and a clause is in such cases inserted in the policy, expressing the agreement that the subject insured shall be valued at the sum insured, or a specific sum specially mentioned. And assuming that the principle of valuation may, by the mutual agreement of the parties, be applied to an insurance against loss or damage to property by fire, still the policy must be specially adapted to the case, and must express on the face of it the assent of the parties to the valuation agreed upon between them.

This policy contains no such agreement or valuation, and has no feature of a valued policy. The assured cannot recover any greater satisfaction for his loss than the actual value of the building which was destroyed by the fire at the time of its destruction. But his contract would entitle him to recover the full value of that building at the time of the loss, if the full amount was covered by the policy. And if the actual value exceeds the sum insured, he will of course be entitled to the whole amount of the insurance towards his indemnity. This general proposition, as applicable to open policies, is admitted by both parties. They differ upon the rule, or principle of valuation ; the insured insisting upon the full intrinsic value of the building as the standard, but the company contending for the relative value of it to the owner, subject to removal from its location at the time of the fire, as the just measure of the indemnity to which he is entitled.

The judge ruled that the intrinsic value of the building at the time was the true measure of the loss within the meaning of the contract of indemnity, and we concur with him in that opinion. The actual value of the premises insured is the standard which the policy obviously contemplated for settling the loss, and adjusting the indemnity. The agreement is to make good the loss or damage to the property by the fire, and the estimate of that

loss or damage is to be according to the value of the property at the time the loss occurs ; and the conditions annexed, to which the policy refers for the explanation of its meaning, are too clear to admit of any other interpretation. A particular account of the loss or damage is to be given in ; and the value of the property, if in question, is to be ascertained by the books of account and vouchers of the claimant, which are to come in aid of the estimate of the value of the property at the time of the loss.

But it is said that the policy is a contract of indemnity, and that the principle of indemnity which pervades the insurance must controul the construction of the policy ; and upon that principle it is insisted, that the value of the property to the assured at the time of the loss, circumstanced as it may then be, in reference to his use and enjoyment of it, is the loss he sustains by the destruction of it, and must be the measure of his indemnity for the loss. It will at once be seen, that if this principle of indemnity is to be admitted, the extent and value of the recovery will in every case vary with the special and peculiar circumstances of the insured, and the local advantages or disadvantages of the building, and the uses to which it is applied ; and the intrinsic value of the building, will form no criterion of the loss of the proprietor in case of its destruction. A building, for example, which the necessities of the owner compel him to offer at public sale, for ready money, will be worth to him no more than what it will produce at such a sale, and a building for which there happens to be great competition, will command a much larger price than its true value. Are these incidental and collateral circumstances to enter into the estimate of value under the contract of insurance, and give the rule of indemnity to the proprietor for the loss of the building ? Two houses, of equal value may, from their local situation, be very unequal in the revenues they produce to the proprietors ; would the loss of them, if destroyed by fire, entitle the proprietors to different indemnities in proportion to the rents, or revenues of the tenants ? Would the insurers be compelled to pay double the amount of the cost of the profitable stand, because the location of the tenement made it of that value to the owner, and yet be compellable to pay for the

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loss of the other tenement, the one half only of its actual cost, because from its unfavourable location, or from some popular prejudice it would sell for no more than one half of its value? It is the tenement upon which the insurance is made; and the actual value of it as a building, is the loss of the insured in case of its destruction by fire. To that measure of indemnity the proprietor is entitled, however unproductive the property may be, and he is entitled to no more, whatever revenue he may have derived from the tenement.

The obligation of the contract, then, is to pay the insured the actual value of the tenement as a building, or a proportion of its value, equal to the sum insured upon it in case of the destruction of it by fire within the term for which the policy protects it, for his indemnity for his loss. The policy in terms, refers to the true and actual value of the property at the time of the loss, and makes that value the standard by which to estimate the loss or damage which the insurer is bound to satisfy, and the insured is entitled to claim. This agreement cannot be otherwise understood than as binding the parties to the intrinsic value of the property at the time of its destruction, as the rule by which the indemnity is to be measured, without reference or regard to any special and adventitious circumstances which may enhance or diminish the relative value or importance of it to the insured. It is the true and actual value of the tenement itself at the time, independently of its location, or the insecurity of the title, or terms by which it is held that the insurers agree to make good to the present proprietor in case the loss or damage by fire happens during the continuance of his ownership, and within the term of the insurance. It is of no importance, whether the tenement stands upon freehold, or upon leasehold ground, or whether the lease is about expiring, or has the full time to run when the fire occurs, or whether it is renewable or not. The condition of the policy is satisfied if the title and ownership are in the insured at the time of the insurance, and at the time of the loss, and the measure of his indemnity is the amount of his interest in the tenement when destroyed by the fire, notwithstanding that the whole interest would have expired the very next day, or soon after the



loss occurred. But whether there may not be incidents, and special circumstances so intimately connected with the premises, or so permanently attached to them as to affect their intrinsic value, or the insurable interest of the party, who effects the insurance upon them, I am not prepared to say; and it is not material to the decision of the question before us to inquire, for this clearly is not such a case. In this case the tenement belonged exclusively to the insured, and the lease of the lot upon which it stood had 15 days to run, and was moreover renewable. The true and actual value of it exceeded the sum insured upon it, and the loss of it by the fire was absolute and total, and took place within the term for which it was insured. The sole ground of objection to the right to recover the full amount of the insurance is, that the lease was about expiring, and had not been renewed, and it did not appear that the notice required by the lease to entitle the holder to a renewal had been given; and on these grounds the recovery is sought to be limited to the value of the building as a tenement to be removed from the premises. But if that contingency could in any supposable case be brought into the calculation, and suffered to reduce the insurable interest, or the claim to indemnity for the actual loss of the building by the fire, (which if I am right in my conclusions on the point, would be wholly inadmissible,) still it would not follow that in this case such deduction could be made, for it is not reduced to a certainty that the lease would not have been renewed. Application may have been made to the agents for renewal; or if the time limited for the renewal as a matter of right had been suffered to elapse, the lessee might within the remaining fifteen days of the subsisting term have made an arrangement with the landlord for the continuance of the lease, or he might have sold the tenement to his successor or to the landlord; or, the tenement, which from its construction, not having any foundation or fixture attaching it to the soil was capable of removal, might have been removed to one of the vacant lots in its immediate vicinity of which it appears in proof there were several. In any one of these contingencies the tenement which is found to have been worth upwards of \$1000, might well have produced to the owner of it the sum of \$800 insured upon it by

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the defendants. The plaintiff, by the total destruction of it by the fire, lost the means of availing himself of the sale, or the removal of it, and may have been compelled by the loss of the building to relinquish the right reserved to him to renew and continue the lease. Besides, if it had been reduced to a certainty that the lease was not to be renewed, and that the building was to be sold or removed, what proof is there that the avails of it if sold, or the value of it if removed to a contiguous lot, would not have been equal to the sum insured upon it? only one witness has been examined to the point, and he simply testifies that he would not have given more than \$200 for the building, if it had been necessary to remove it; but to give his testimony decisive weight, he should have stated, what the probable expense would have been to remove it to the adjoining lot, and what its value in such new location would have been; because, if offered for sale, the owner of the contiguous vacant lot might have competed for the purchase of it for that purpose. But witnesses testifying to the point under the most favourable circumstances could only speak from opinion, and the value they would put upon a tenement so circumstanced could be no more than estimates, which would vary with the opinions and views of the witnesses. The value of the building to Dodge, the witness who was examined, for example, would be much less than it would be to the new tenant, who should succeed the plaintiff, or the landlord who owned the lot on which it stood, or to the owners of the vacant lots in its immediate vicinity. Are such estimates then a just criterion for the measure of the indemnity of the insured for his loss? He was clearly entitled, even upon the principle the defendants would apply to his case, to the price his building would have sold for. What sum it would have produced on a sale of it cannot now be known; but as the fair value of it to himself, if he had continued in the tenure of the premises, or to the tenant who might succeed him, or to the landlord, exceeded the amount of the insurance, he has a just claim upon that principle to a full recovery.

In another view of it, the rule contended for by the insurers would be unequal and unjust in its operation. The insured pays the premium upon the whole sum, and he insures for the entire

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risk of the property to that amount, during the whole term of the policy. He has a right, therefore, to claim the amount he thus insures, if he loses property of that value by the peril, during the continuance of the risk ; but if other considerations are to enter into the calculations of value, and he is to be paid at a reduced rate, because in certain contingencies the property might fail to produce to him the full value of it as it stood at the time of the loss, he will not have the full benefit of his insurance, for which he has paid the full premium.

These views of the practical results of a speculative calculation of damages on the principles for which the defendants contend, present to us powerful considerations for preferring the true and actual value of the building as the standard of indemnity.

The intrinsic value of the tenement, as a building at the time of the loss, is not a matter of mere estimate, but is susceptible of proof. The 9th condition attached to the policy prescribes the form and substance of the proofs required of the claimant to entitle him to payment, and the true and actual value of the property at the time of the fire, is the rule by which the amount of the loss or damage is to be estimated and settled. The rule is uniform and rational ; it is in accordance with the letter and spirit of the contract, and administers equal justice to the parties. It was in my judgment rightly applied to this case, and accordingly the motion for a new trial must be denied.

[C. Graham, atty for plff. J. Anthon, atty for defts.]

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## CASES IN THE SUPERIOR COURT OF

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1888.Allen & Allen,  
v.  
Thompson.

SOLOMON ALLEN &amp; MOSES ALLEN

versus

JEREMIAH THOMPSON.

A default regularly entered will never be set aside without an affidavit of merits. The plaintiffs filed a declaration containing both special and common counts. The defendant pleaded specially to the special counts, but omitted the general issue to the common counts. The plaintiffs caused the special pleas to be stricken out as *sham* pleas, and entered a *nolle prosequi* on the special counts, and a default for want of a plea to the common counts. The default was held to be *regular*, but the court gave the defendant the opportunity of setting it aside by paying costs, and filing an affidavit of merits.

*Mr. C. Walker*, for the defendant moved to set aside a default upon a special affidavit, but which contained no averment of merits. The suit was an action on several promissory notes, and the declaration contained special counts on the several notes, together with the usual common counts. The defendant pleaded specially to the counts on the notes, but omitted the general issue entirely. Whereupon the plaintiffs caused the special pleas to be stricken out as *sham* pleas, by applying to a Judge at Chambers, and entered a *nolle prosequi* as to the special counts, and a rule for a default for want of a plea to the common counts. The defendant then pleaded the *general issue* which the plaintiffs disregarded. *Mr. Walker*, now moved to set aside the default as being irregular, and contended, that the defendant was entitled to time to plead *de novo*, after the special pleas had been stricken out.

*A. Dey, contra.*

*Per Curiam.* The default was regularly entered, and the motion to set it aside must be denied. As the defendant, however may have a defence, the default may be set aside upon the defendant's paying costs to the plaintiffs, and filing an affidavit of merits, *instantly*.

[*A. Dey, atty for pliffs. C. Walker, atty for defl.*]

ISRAEL FEARING *versus* HORATIO N. CLAWSON.August Term  
1886.Fearing  
v.  
Clawson.

If an infant defendant who is arrested, does not appear to the action, nor take any notice of the arrest; upon motion of the plaintiff, and on notice to the infant, the court will appoint a nominal guardian, *ad litem*, for him in order to prevent the proceedings from being afterwards set aside.

*Mr. W. Price*, in behalf of the plaintiff in this case, made an application for the appointment of a guardian *ad litem* to the defendant, an infant, who had been arrested, but had not appeared, nor taken any notice [of the arrest. He read an affidavit setting forth, that the action was brought for *necessaries* furnished to the infant.

The plaintiff, he said, could not safely take a default against the defendant, because, as laches cannot be imputed to an infant, he might, after the default, cause the same to be set aside; on the application of his guardian. From the books of practice, and the decisions of our courts, it appears, that the guardian named need not be a real person to appear and make defence; but a rule may be entered for the appointment of a nominal guardian merely. [2 *Sell. Prac.* 68. 2 *Arch. Prac.* 145. 6 *Coven's R.* 50.]

*Per Curiam.* Were it not for the authorities cited, we should incline to the opinion, that in bailable actions, the guardian to be appointed should be some *real* person to appear and protect the rights of the infant. But it seems from the books, that a mere *nominal* guardian may be named in cases where the infant neglects to appear. The rule does not seem to be well founded, and this court will hereafter establish some general regulation to establish its practice upon the subject.

In the present instance, let a rule be entered for the appointment of a nominal guardian *ad litem*, for the infant defendant, upon the plaintiff's giving him due notice of the rule, that he may have an opportunity to come in and name a guardian for himself.

[W. S. Sears atty. for plff.]

August Term  
1828.

Cromwell and  
Wing.  
v.  
Lovett.

EDWARD CROMWELL & DANIEL WING

*versus*

GEORGE LOVETT.

Where a check on a bank is given, in the ordinary course of business, it is not presumed to be received in absolute payment of a debt, even if the drawer have funds in the bank, but as the means whereby the holder may procure the money. The holder becomes the agent of the drawer to collect the money : and if guilty of no negligence in presenting the check for payment, whereby an actual injury is sustained by the drawer, he will not be answerable, if from any peculiar circumstances attending the Bank, the check be not paid ; but in a suit against the drawer for the consideration of the check, the holder may treat it as a nullity, and resort to his original cause of action.

The plaintiffs sold the defendant a quantity of timber, and having presented their account for the same to the defendant, on the 28th day of May, 1828, at 5 o'clock, P. M., received his check on the Franklin Bank of the City of New-York, for \$1000.—At half past ten o'clock A. M. the next day, the Bank was prohibited from making any payments, by an Injunction out of Chancery ; and the check was, consequently, never presented.—Held, in an action brought by the holders against the drawer of the check, under these circumstances, that the plaintiffs might waive the check altogether, and recover the value of the timber, in an action of *indebitatus assumpsit*.

THIS was an action of assumpsit, tried before Mr. Justice OAKLEY, on the 8th day of October 1828.

The declaration contained three counts upon a check for \$1000, bearing date the 28th day of May 1828, drawn by the defendant, on the Franklin Bank of the City of New-York, made payable to D. W. Wing, or bearer, and delivered by him to the plaintiffs.

The first count was in the usual form, and averred a presentment of the check, to the Cashier of the Franklin Bank for payment, on the 29th day of May 1828, his refusal to pay the same, and notice to the defendant on the same day.

The second count, in addition to the ordinary averments, set forth, "that after the making of the said draft or order, and before the payment thereof, to wit, on the 29th day of May, in the year aforesaid, between the hours of ten and twelve o'clock "in the forenoon of that day," "the said Franklin Bank," "stopped payment, and from thenceforth entirely suspend-

ed its ordinary and accustomed business as a bank, and from thenceforth ceased to pay the drafts or checks of depositors or dealers with said bank." "By reason whereof the said defendant" "became liable to pay to the plaintiffs the sum of money in the said draft or order specified," &c.

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The third count was exactly like the first, except that it alleged a demand, refusal and notice on the 4th day of June, 1828.

The declaration also contained the usual money counts, and a count on an *insimul computassent*.

At the trial the plaintiffs proved, that in the month of May, 1828, they sold and delivered to the defendant a quantity of timber. That on the 28th day of the same month, the parties made a settlement for the timber at the hour of 5 o'clock P. M., and that on the settlement, the defendant gave one of the plaintiffs his check on the Franklin Bank for one thousand dollars. The plaintiffs then read the check in evidence, and presented an account of the timber stated by the defendant himself exhibiting a balance of \$1,046 10 cts. due from him to the plaintiffs.

A teller of the Franklin Bank was then called as a witness by the plaintiffs, who testified that on the 29th of May, 1828, that bank stopped payment in consequence of a writ of injunction, issued out of the Court of Chancery, and served on the bank on that day; that he received orders from the cashier at half past 10 o'clock of the same day not to pay any checks or drafts; that from that time the bank entirely ceased to do business, and that no checks or drafts were paid by it afterwards.

The witness also testified that at the time the bank stopped payment, the defendant had sufficient funds therein to pay said check, and that it would have been paid, if it had been presented before the bank stopped payment. He further testified, that checks were paid as usual at the bank on the 29th of May, from the opening of the bank until the injunction was served.

The plaintiffs offered no evidence to support the averment of demand and notice set forth in the first and third counts of their declaration: and the foregoing was all the testimony in the cause.

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A verdict was taken for the plaintiffs subject to the opinion of the court upon a case to be made, and either party had leave to turn the case into a bill of exceptions. If the court should be of opinion that the plaintiffs were not entitled to judgment, then a nonsuit was to be entered.

The cause was argued by *Mr. P. A. Cowdrey and Mr. J. Anthon*, for the defendant, and by *Mr. D. B. Tallmadge* for the plaintiffs.

For the defendant it was contended,

I. That as the defendant at the time of drawing the check had ample funds in the bank, the plaintiffs ought to have presented the same for payment; and if payment had been refused, notice should have been given to the drawer.

A check is to be considered as an inland bill of exchange, and subject to the same rules. [7 T. R. 430. *Chitty on Bills*, 17. *Cruger v. Armstrong*, 3 J. C. 5.] The contract on the part of the holder of a check is, that it shall be presented at the bank for payment: and in case of non-payment, that notice shall be given to the drawer. And the general rule is, that the check is *not due* from the drawer, until payment has been demanded of the drawee, and refused. [*Murray v. Judah*, 6 Cowen, 484.] If the holder of the check be guilty of any *laches* in making demand, damage to the drawer will be presumed. [*Chit. on Bills*, 258.]

The *only* excuse for omitting to make demand and give notice to the drawer, is the want of effects in the hands of the drawee: [*Chit. on Bills*, 258. *Dennis v. Morrice*, 3 Esp. R. 158.] The necessity of notice is not dispensed with by the bankruptcy, insolvency, or death of the acceptor of a bill, or maker of a note. [*Russell v. Langstaff*, Doug. 515. *Warrington v. Furber*, 8 East, 245. *Esdaile v. Sowerby*, 11 East, 117. *Howe v. Bowes*, 16 East, 113.]

II. The check was an assignment of the defendant's funds *pro tanto*, and the injunction staying the payment was at the risk of the plaintiffs.

Whether the plaintiffs claim under the counts upon the check, or upon the *insimul computassent*, the defendant is equally entitled



to a presentment of the check at the bank for payment, and to notice of its dishonour. If a bill of exchange or promissory note be taken in satisfaction of a precedent debt, the creditor cannot proceed in an action for such debt without showing, that he has used due diligence to obtain acceptance or payment; and also showing, if the defendant was a party thereto, that he had due notice of the dishonour. [*Smith v. Wilson*, *Andr. R.* 187. *Bridges v. Berry*, 3 *Taunt.* 180. 3 *M. & S.* 362. *Chitty on Bills*, 125, 126.]

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If notice of non-payment be not given, the parties are not only discharged from liability on the bill, but from the original consideration of it. [*Rucker v. Hiller*, 16 *East*, 43. *Bayley on Bills*, 167. *Chitty on Bills*, 256. *Master v. Miller*, 4 *D. & E.* 343.]

In this case there never was a demand of payment, and notice of the facts have never been communicated to the defendant. If due diligence in making presentment had been used, the check would have been paid; for the drawer had sufficient funds to cover his draft. The bank was not insolvent, and the plaintiffs cannot excuse the want of demand and notice. The defendant therefore is exonerated from all liability on the check; the funds in the bank, to the amount of the check, were at the risk of the plaintiffs, and they cannot recover the consideration, which has been lost by their default.

*Mr. Tallmadge*, for the plaintiffs.

1. The balance due to the plaintiffs has been struck by the parties, and the plaintiffs are entitled to recover on the count on the *insimul computassent* unless they have been paid. The check was not received as payment; and it will not be considered as such in law, unless expressly proved to have been given for that purpose. [1 *Coven.* 376. 2. *Camp.* 515.]

The original debt is still subsisting; and as the check was received merely as collateral thereto, the inquiry is, whether the plaintiffs have been guilty of such *laches* as will make them liable for the amount of the check. They were the mere agents of the defendant to collect the money, and can only be liable for such negligence as would charge an agent or attorney.

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If the plaintiffs had waited beyond what might be deemed a reasonable time before they presented the check, and if the bank had stopped payment *after* that period, whereby the defendant had lost his funds, then the plaintiffs might have been chargeable with the loss. But here the bank stopped payment, *before* even a reasonable time for presentment had elapsed; and therefore no *laches* can be imputed to the plaintiffs.

II. The bank having stopped payment under an *injunction*, this case differs from that of an insolvent or bankrupt drawee, and the plaintiffs were not bound to present the check.

A check differs from a bill of exchange, in various respects; and the stoppage of the bank by injunction will excuse the want of presentment and notice even in a suit upon the check.

It is generally said that the obligations and liabilities of a drawer of a bill, and those of the endorser of a note are alike. But there is a difference in the cases; for *no excuse* will dispense with demand and notice, where an *endorser* is to be charged, either on a note or a bill; while want of effects in the hands of the drawee, in some instances, will excuse demand and notice, where a *drawer* is to be charged. [*Chitty on Bills*, 274. (n.) 13 *East*, 189.]

But if the rules which apply to endorsers of notes are equally applicable to drawers of bills, still the defendant in this case has no right to claim to be discharged from his obligations upon the check, because he received the immediate consideration for it. Where the money raised upon a note is received by an endorser who is ultimately to pay it, notice of non-payment may not be necessary [11 *J. R.* 181.]

The true principal is, that a demand and notice are not necessary in a suit against the person *who is liable in the last resort*. [4 *Cranch*, 146.] If, then, the drawer or endorser receives the consideration for the bill, he dispenses with notice.

But bank checks have often been treated as differing from bills of exchange. [2 *Camp.* 515. 3 *J. C.* 5.] In this last case Radcliff, J., plainly intimates, that a check *might* be presented to the bank, even after a lapse of four years, and the foundation for a suit laid, if the defendant could not show some injury arising from

the delay. In 7 Cowen, 176., Judge Woodworth intimates a doubt whether a demand in the case of a check is necessary at all; thus showing that he did not consider drawers of bills and endorsers of notes as standing in the same situation.

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III. But if this check is to be considered as completely assimilated to a bill of exchange, the situation of the bank dispensed with a demand and notice.

The rule is, that when the drawer has no funds in the hands of the drawee at the *maturity of the bill*, (although there might have been effects at the time when the bill was drawn) then notice is dispensed with. Is there any difference in principle, whether the funds are actually withdrawn, or whether they are locked up by an injunction?

In the ordinary cases of insolvency on the part of the drawee, a demand and notice are not dispensed with, because the bill may be paid by *other means*; as by the assistance of friends, or a special appropriation. In this case the reason cannot operate; for a payment of the check would have been a violation of the injunction, and would have subjected the party to punishment. The defendant then has had no effects in the bank at any period within a reasonable time for presenting the check, which could have been applied to his draft. He has not been injured by a want of demand and notice; because such demand would have been totally unavailing, unless made at the earliest possible moment after the check was drawn. This extraordinary promptness is not required of the plaintiffs, and they were merely bound to use ordinary diligence, or to avoid all neglect. No *laches* in this case can be imputed to them, and they are entitled to recover, either upon the second count, or on the *insimul computassent*.

JONES, C. J., after stating the facts of the case, observed, that the questions arising upon the facts were, first, whether proof of the presentment and demand of the check and notice of its dishonour were, under the circumstances of the case, indispensable prerequisites to a recovery on the check? and secondly, whether the balance, for which the check appeared to have been given,

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was recoverable on the count, upon an account stated or not.

These questions were considered by him at large upon the general principles of law applicable to the case ; but his opinion upon the other points, they involve, is omitted, and that portion of his observations alone given, which relates to the legal effect and operation of the injunction upon the right of the parties ; and which branch of the subject was considered by him only. After expressing his opinion on the other question in the cause, the Chief Justice proceeded as follows :

But if the general rules of law or the usage of merchants required the presentment of the check and the demand of the money, as prerequisites to the right of action against the drawer ; and if the insolvency of the bank, or the temporary suspension of its payments, would not excuse the neglect of demand of payment and notice of dishonour, and if even proof of the due observance of these formalities should be held necessary to entitle these plaintiffs in other circumstances to sustain an action upon the antecedent debt, for which the check was given, yet this case would not, in my view of it, come within the rule. This case does not stand upon the insolvency of the bank, or its suspension of payment solely.

The stronger ground is, that the bank was under a legal restraint, and disabled by process of law from applying the deposits of the drawer to the payment of the check : and if such was the case, a demand could not have been of any possible avail to the drawer, and the reason given for requiring a demand upon a bankrupt fails ; since the officers of the bank could not be expected under such circumstances to interpose with their own moneys to pay the drafts of the dealers. How far a mere temporary restraint by an injunction at the suit of a party, praying for it as a precautionary measure, and which is liable to be dissolved or modified, would excuse the necessity of a demand, may perhaps be questionable : for in such case the deposits of the drawer, on which he values remain entire, and it may be, that the obstacle to their application to the payment of the check will be speedily removed. But was this such an injunction, or was it

not the remedial process authorised by the act of the 21st of April, 1825. "to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them, and for other purposes?"(e)

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By the 17th section of that act, the court of Chancery is authorised and required,—upon the application of the attorney general, or a creditor of any incorporated bank or company, and upon proof that such company is insolvent, or that it has violated any of the provisions of the act incorporating it, or of any other act, which shall be binding upon it,—to issue an injunction restraining such company and its officers from exercising any of the privileges or franchises granted by the act incorporating such company, or by any other act, from the collecting or receiving any debts, and from paying out or in any way transferring any of the monies or effects of such company, until such court shall otherwise order; and the act provides, that it shall be lawful for such court to appoint a receiver of the monies, property and effects of such company, and to distribute the same among the fair and honest creditors thereof. The legal effect of this proceeding is to dispossess the officers of the bank of all power and control over the money of the bank, and to make it unlawful for them to pay any order or checks upon them. And when the process of injunction is accompanied with or followed by the appointment of a receiver, the effect upon the depositors is to divest them of the right to withdraw their deposits, and it effectually operates as a statute-countermand of their checks.

The terms of the act are peremptory, that the monies, property and effects of the company shall be distributed among the fair and honest creditors of the institution; and the depositors and bill-holders are equally creditors of the corporation, and the deposits make part of the monies of the bank distributable amongst the creditors generally.

The money which a dealer deposits is not kept distinct and separate in the vaults, for the use of the depositor to be specifically returned to him upon demand; but it is intermingled with the other monies of the institution, and makes part of its general

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fund for the common benefit, and only entitles the deposit or to a credit upon the bank to the amount of his deposit: giving him a right to draw upon the bank to that amount at pleasure, in checks payable upon presentation.

When therefore the bank subjects itself to the provisions of the statute, and the injunction issues and a receiver is appointed, all right of every creditor to payment, other than by the ultimate receipt of the distributive share of the assets wholly ceases. The depositors and the bill-holders are alike deferred to the final settlement of the affairs of the bank for their dividend. The fund for the payment of checks is abstracted by the force of the statute, and the check can no longer be paid by the cashier, however great his desire may be to pay it. Can a demand be necessary under *such circumstances*? or must not the entire change in the state of things absolve the holder of the check from the obligation of presenting it for payment to drawers, who would incur a contempt by paying it, and moreover act in their own wrong, perhaps, and render themselves liable for the whole amount of the money to the creditors. Is not the transfer of the fund, upon which the check was drawn, from the officers of the bank to the receiver by the operation of law, equivalent to the withdrawal of the money, by the drawer of the check, and must it not equally dispense with the necessity of a presentment, or the formal demand of the money? The Supreme Court of the State of Massachusetts in the case of *Hale v. Burr*, [12 *Mass. R.* 86,] decided that no demand of payment upon the personal representatives of a deceased promisor, or notice of non-payment was necessary, under the laws of that state, to charge the indorsers; because an administrator is not obliged to pay any debt of the deceased, except such as are privileged until the lapse of a year from his appointment, and because, in case of a deficiency of assets to pay the debts, a general distribution takes place among all the creditors, with the exception only of those who fall within the privileged classes. A demand therefore upon the administrator would be nugatory, and a mere troublesome formality, and it would be idle to require it. The court in that case admit the rule to be otherwise in England; but they take the distinc-

tion that in England the executor or administrator is at liberty to pay any debt he pleases, in preference to others of the same degree, and to the total exclusion of all others of the same class, provided the residue of the assets are sufficient to discharge those of a higher grade, and that he may in such case discharge himself, by showing that he has fully administered. In England, therefore, the administrator may pay the bill when called upon; and the other parties upon it have a right to the chance that he will. But in the state of Massachusetts, where the estate is insolvent, there is no reason to presume, or to suppose, that a demand would be effectual. This distinction appears to me to rest upon a solid foundation; and considerations equally powerful apply to the case of a bank, whose operations are arrested by these peculiar statute-provisions existing in our state, and whose affairs are to be wound up and settled by a receiver. Such a case must form an exception to the general rule. No principal of law, nor any mercantile usage, can require so vain a ceremony, as a formal demand of payment upon a party, who is by a public statute divested of the means and the authority to pay.

If, therefore, it sufficiently appears that the injunction in this case did issue under that statute, no demand of the check could be necessary, nor any notice of non-payment. The case is deficient in clearness on this point, and it will be difficult to collect the character of the injunction from the fact it discloses. But the nature of the proceeding against the bank is a matter of notoriety. We cannot shut our eyes to the fact. The bank was a public institution located in this city. The injunction, which suspended its operations, emanated from one of the highest judicial tribunals in the state, and was openly and publicly announced at the bank. It was accompanied, or promptly followed by the appointment of a receiver, who immediately entered upon the duties of his office, and displaced the officers of the bank; and whose appointment, with the powers vested in him thereby, were published in the gazettes of the city. Acts so public, and proceedings so decisive in their character, and so open and efficient in their operation, were calculated to attract the attention of the citizens generally; and the debtors and creditors of the bank, in common with its

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officers and dealers of every description, were not only chargeable with notice of them, but must have been conusant of them. If therefore the case had been wholly silent on the subject, and had merely stated the fact, that the bank had discontinued its operations, and suspended its payments, the court might perhaps have judicially noticed the cause of the suspension. But the injunction is expressly declared to be the cause ; and the case refers to the process and its general effect upon the institution as matters of public notoriety, which it was not necessary further to describe or explain. An injunction issued out of the court of chancery arresting all the operations of the bank, and causing it to discontinue the payment of all drafts and checks upon it, and which was continued in force from the month of May, to the time of the trial of this cause, in the month of October following, cannot be regarded as a mere temporary measure, nor properly referred to the ordinary powers of the court, but must be ascribed to the summary jurisdiction conferred upon the Chancellor by the statute.

It is difficult to conceive a case in which that court, in the exercise of its ordinary jurisdiction, could discreetly award to a suitor seeking equitable relief by bill, as a mere cautionary measure, a process at once arresting the whole movements of a public bank in full operation, and deranging all the calculations of its numerous dealers, and shaking the public confidence in its solidity. Such a measure, unless speedily removed, must prostrate any monied institution. It is a remedy for extreme cases only ; and its general application to ordinary cases could not be tolerated. Before the statute, it was unknown ; and under the statute it is applied in those cases only, where the object and intent is to break up the institution, and distribute its funds among its creditors and stockholders ; and with the supplementary provision of a receiver to wind up its concerns, and the settlement and distribution of its property under the direction of the court, it becomes an efficacious and salutary remedy, for the the extreme cases, to which it was intended to be applied. When, therefore, it is predicated of a public banking institution, operating under an act of incorporation, that its payments have been suspended, and its operation



ceased, in consequence of an injunction issued out of the Court of Chancery, we must necessarily intend, that the injunction issued under the statute, and makes a part of the summary remedy provided for the cases specified in the act.

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The injunction, then, to which this case refers, must be the summary process given by the statute, and, from its long continuance, must have been accompanied by the appointment of a receiver. But let it be conceded for a moment, that we are not at liberty to act upon the knowledge of matters, which we derive from public records and judicial acts and proceedings of general notoriety, and that the case does not sufficiently disclose the nature of the injunction, to enable us judicially to refer it to the statute ;—the consequence then would be, that we must grant a non-suit, and turn the plaintiff round to another suit, or we must award a new trial for the sole purpose of introducing that evidence into the cause. *Cui Bono* ? The facts are notorious, and the certain results of another trial, if my conclusions from these facts are correct, must be a verdict for the plaintiffs. But I am satisfied, that upon the case as it stands, I may, and ought to take the injunction, which stopped the operations of this bank, to be the statute process issued under the act of the 21st of April, 1825, to prevent fraudulent bankruptcies, &c. I feel myself bound, therefore, to look to the peculiar character and legal effects of this statute-injunction ; and the brief view I have taken of them, satisfies me that they render this case an exception to the general rule, and that no previous presentment of the check to the bank for payment was necessary to sustain the suit. I am accordingly of opinion, that the verdict is right, and that the motion for a non-suit must be denied.

OAKLEY, J., after stating the facts of the case.

I think, upon this state of the case, that the plaintiff has a right to recover, upon the count in his declaration, on an *instimul computassent*.

It is well settled, that the giving of the check in question was no payment of the debt arising from the sale of the timber. [*Porter v. Talcott*, 1 Cowen, 359. *Everett v. Collins*, 2 Camp. 515.] If

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the check was unproductive, without any fault or negligence on the part of the plaintiffs, they may resort to the original indebtedness, as the ground of the action. Not having received the check in payment of the account for the timber, they were merely agents of the defendant in drawing the money from the bank, for the purpose of applying it to the satisfaction of the debt; and if they were not guilty of any negligence in the transaction, whereby the defendant has sustained an injury, they may return, or cancel the check, and sue on the original consideration.

It is clear, that there was no negligence on the part of the plaintiffs, in not presenting the check at the bank, before it stopped payment. The bank was open but half an hour after giving the check, and the rule appears to be settled, that no *laches* can be imputed to the holder, if the check is presented at any time during the day after that on which it was given. [*Chitty on Bills*, 274. 5.]

It does not appear, in the case, that any notice was given to the defendant that the bank had stopped, or that the check had not been paid. Before the defendant could avail himself of the want of any such notice, it was incumbent on him to show that he had been injured by it. The nature and origin of the injunction served on the bank do not appear. But as the effect of it is stated to have been an entire suspension of the business of the bank, we may take judicial notice, that it must have been issued in pursuance of the 17th section of the "*Act to prevent fraudulent bankruptcies by incorporated companies*," [7 L. N. Y. 453.] and the legal inference therefore is, that the bank was insolvent. The effect of the injunction was, to divest it of all its funds, and render it unable to pay any of its debts; all its property being thereafter subject to general distribution among its creditors, under the direction of the Court of Chancery.

In the absence of any proof on the subject, we must infer, that the defendant sustained no injury by the want of notice, that his check had not been paid, as he could have taken no steps to withdraw his funds from the bank.

The whole case seems to resolve itself into this: the defendant has purchased the property of the plaintiffs; has given his

check on a bank, not in payment of the debt, but to enable the plaintiffs to procure the money to satisfy it; and the check has proved unproductive, by reason of circumstances, beyond the control of the plaintiffs, and without any negligence on their part, which has been the source of injury to the defendant. The defendant, then, must still remain liable for the property, and there being an appropriate count in the declaration, the plaintiffs are entitled to judgment.

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This view of the subject renders it unnecessary to consider whether, under the peculiar circumstances of this case, the plaintiffs were bound to prove a presentment of the check, and notice of its non-payment, as if they had sued on the check alone: and I do not mean to give any opinion on that point.

HOFFMAN, J., concurred in this opinion.

*Judgment for the plaintiffs.*

[E. Curtis, *Att'y for the plffs.* P. A. Cowdrey, *Att'y for the defl.*]

*Note.*—This cause was afterwards carried by the defendant into the Supreme Court, where the judgment of this court was affirmed.

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THE PRESIDENT, DIRECTORS AND COMPANY OF THE CITY  
BANK OF NEW-YORK

*versus*

HEZEKIAH BARNARD AND WM. W. MACY.

Certain Directors of the City Bank, for the purpose of controlling the election of its officers, entered into an arrangement for the purchase, upon the account of the bank, of a large amount of its stock, (then held by a certain individual,) at a premium of seven per cent. above its par value.

To effect this object, they paid for the stock with the *funds of the bank*, to the amount of its par value, and transferred the same, in trust for the bank. For the purpose of paying the amount of the *premium*, each director borrowed \$3500 of the bank, by causing his own promissory note, regularly endorsed, to be discounted at the bank.

In an action brought by the bank upon one of these notes against the defendants, who were endorsera, they were not allowed to set up the *illegality* of the original transaction, as a defence against the note.

Illegality of consideration, (except in particular cases arising under the provisions of certain statutes,) does not avoid a note in the hands of a *bona fide* holder, without notice; and in this instance, the bank was considered as an innocent third party.

THIS was an application for a new trial, on the part of the defendants. The cause, upon which the application was founded, was tried at the July term of this court, before Mr. Justice HOFFMAN. At the trial, the presiding judge rejected all the evidence offered by the defendants to sustain their defence, and the plaintiffs obtained a verdict. Exceptions to his opinion were taken by the counsel for the defendants, and a motion for a new trial was now made, founded upon the supposed error in rejecting the testimony. The evidence itself, thus offered, and the facts of the case, together with the points of defence relied on by counsel, being fully stated in the opinion given by Mr. Justice OAKLEY, it is not deemed necessary to recapitulate them here.

The cause was argued by *Mr. W. S. Johnson*, for the defendants, and *Mr. J. Anthon* for the plaintiff.

OAKLEY, J. This action is brought on a note, dated the 12th of Nov. 1827, drawn by Jethro Mitchell & Co. payable to the defendants, and endorsed by them to the plaintiffs. On the trial the defendants offered to prove, in substance, that in the year 1825, Charles Lawton, in concert with certain persons, a majority of whom, at the next election, became Directors of the City Bank, purchased a large quantity of the stock of the said bank, for the purpose of obtaining the control of the election of its officers. That by means thereof, Lawton and his friends were made directors; and Lawton was chosen Vice President. That soon afterwards, to prevent Lawton from selling said stock to other persons, who would change the directors and officers of the bank, and in order to keep themselves in office, the said board of directors purchased Lawton's stock, and the same was transferred to the bank, or to the cashier in trust for the bank. That the bank agreed to pay Lawton the par value of the stock, and seven per cent. premium; and Lawton agreed to leave the said bank, and resign his seat as a director. That it was then further agreed by the persons composing said board of directors, as individuals, and not as a board of directors, and as a part of this arrangement, that they, with the cashier and certain other persons to be made directors, would each give an endorsed note for the sum of three thousand five hundred dollars, to make up the premium on Lawton's stock: which notes were to be dated on the first of Nov. 1825, and made payable at six months, and were to be discounted by the bank, and the avails applied to the payment of the said premium. That it was further agreed, that each director, who should give his note, should retain his seat as long as he thought proper; and if he retired, should have the right to name his successor. And further, that if the said stock should be sold, at an advance on its par value, any person, who should so give his note, should receive his share of such advance; but should not be prejudiced by any fall of the stock below its par value.

The defendants further offered to prove, that Jethro Mitchell was one of the directors of the said bank, at the time of the said arrangement, and in pursuance of the same, gave his note, en-

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dorsed by one Merrick for the sum of \$3500, dated on the first of November aforesaid. That the same was discounted by the plaintiffs, and the avails applied as aforesaid. That when it became due, it was renewed by Mitchell, and indorsed by the defendants: that it was reduced, by sundry payments made by Mitchell, to the amount of the note in question, which was given and indorsed without any new consideration. That the note in question, with all the preceding ones, had always remained in the hands of the plaintiffs as holders, and that they fully knew all the circumstances under which the same had been given. And they further offered to prove, that, at the first or second election of directors, after the giving of the said note, Mitchell was left out of the board, without his consent.

The plaintiffs' counsel objected to the evidence thus offered, as being insufficient to constitute a defence to the action; and the Judge, being of that opinion, rejected it. To this opinion the defendants' counsel excepted.

It is now contended, on the part of the defendants, that the facts offered to be proved show, that there was no valid consideration for the note in question, and that the same is void in the hands of the plaintiffs.

The transaction, out of which the original note (of which the present is a renewal or continuation) took its origin, is supposed to be a violation of the 2d section of the act of the 21st of April, 1825, [*sess.* 48. *ch.* 325.] by which it is provided, that it shall not be lawful for the directors of any bank "to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock, or to reduce the same without the consent of the Legislature;" and that in case of any violation of the provisions of the said section, the directors concerned therein shall be individually liable "to the said corporation," "and to the creditors thereof in the event of its dissolution," to the amount of the capital stock, so withdrawn or reduced, &c.

Assuming that the purchase of the stock of Lawton was a violation of this act, it does not, in my judgment, follow, that this note is void. The act does not declare void, any note or security given under the circumstances prohibited by it. The directors

may be personally liable to the extent provided by the act: but the transaction may still be valid, as to all third parties. The corporation, which is the plaintiff in this case, is clearly to be distinguished from the directors, when acting as individuals, or acting in violation of their duty. And under the provisions of the act in question, the distinction is particularly to be observed. The directors are made personally responsible to the corporate body, for their violations of this law. If, therefore, they should be considered as representing, in the purchase of the Lawton stock, the bank itself; and the corporation should thus be made the real actor in the transaction, the legislature would appear to have been guilty of the absurdity of indemnifying the corporate body, by the responsibility of the directors, against the consequences of its own acts.

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It is manifest, that the object of the legislature was to protect the corporation; or in other words, the whole body of the stockholders against the acts of the directors. The plaintiffs, therefore, are justly to be considered, in the purchase of the stock in question, as a third party, unconnected with the transaction, and innocent of any violation of law. In this view, they are *bona fide* holders of the note, on which the suit is founded, having discounted it in the regular course of business, and for a full consideration actually advanced.

It is a well-settled principle, that illegality of consideration, (except in certain cases, arising under the provisions of certain statutes) does not avoid a note in the hands of a *bona fide* holder without notice. [*Chit. on Bills* 89.] And it would be doing violence to the justice and good sense of the case, to consider the knowledge of the maker of the note, or of the other directors, of the circumstances attending its inception, as notice to the corporate body, so as to charge it with the consequences of an act, which was in violation of its own rights and interests.

It seems to be quite clear, that the maker of this note could not be permitted, to interpose the present defence to an action against him. He, as one of the directors, in violation of his duty to the corporation, discounted his own note. He can never be permitted to allege his own illegal act to avoid it. He stood in

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this transaction in relation to the plaintiffs, in the situation of a trustee. If he violated his duty as such, it would outrage the principles of common honesty, to permit him to set up that very violation, as the ground of avoiding his own contracts with his *cestuy que trust*.

But in truth, in the purchase of the stock from Lawton, the maker of this note did not act merely as a director of the bank. As far as the premium to be paid to Lawton was concerned, (and for a portion of that, the note in question was given,) the directors acted expressly as individuals. Each was to become individually bound for his share of the premium. And although the stock was to be transferred to the bank, or in trust for it, each director had an individual interest in it. If it could be sold for an advance above its par value, such advance was to be divided among the directors, who should pay their proportions of the premium; and such advance might have exceeded the seven per cent. allowed to Lawton.

The directors seem to have proceeded on the idea, that they had a right to purchase the stock at its par value, on account of the bank; but that they could not appropriate the funds of the bank to pay the premium on it. They therefore agreed to pay that premium themselves, and to rely for an indemnity on the advance of the stock in the market. It is true, that among other objects, they sought to secure themselves in the direction of the bank. Their purpose in this respect was not only illegal, but would have proved nugatory. Upon the principles established by the Supreme Court in the case *ex parte Holmes* [5 Cowen 434.] the stock in question could not have been voted upon, in any election of directors. But this illegal contract certainly ought not to enable the directors to withhold payment of the money, borrowed by themselves of the bank, with the view of effectuating that intent.

If the note in question is a valid one, as between the plaintiffs and the maker, the defendants having endorsed it, for the accommodation of the maker, are bound by it. In the case of such notes, no consideration ever passes between the endorser and the maker. And the endorser can never inquire into the



consideration, as between the maker and holder, unless the circumstances be such as to make the note void against the maker himself, as in the case of usury.

I am of opinion, therefore, that the judge at the trial was right in rejecting the evidence offered by the defendants, and that the motion for a new trial must be denied.

*Motion for a new trial denied.*

[B. Clark, *Atty. for Plffs.* W. S. Johnson, *Atty. for Defs.*]

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NEWELL BRACKET *versus* JOSEPH SIMONDS.

In this Court, no copy of a declaration or other pleading can be served upon the opposite party, until after the original has been filed with the clerk, and an appropriate rule entered in the rule book.

*Mr. Hawes*, in behalf of the plaintiff, moved to set aside a default, which had been entered against him for not declaring, pursuant to a rule duly entered for that purpose, in the book of common rules.

It appeared, that the plaintiff's attorney had delayed the drawing of his declaration until the last day limited by the rule; that on the evening of that day, he served a copy of the declaration upon the defendant's attorney, at *his own house*, but did not file the declaration, nor enter the rule to plead, until the succeeding day. On the day after the service of a copy of the declaration, the defendant's attorney went to the clerk's office, and there ascertained, that, at the time when the copy of the declaration was served upon him, the declaration itself had not been filed. He thereupon entered a default against the plaintiff, for not declaring in due season.

The motion now was, to set aside this default. And it was contended, in behalf of the plaintiff, that by the settled practice of the Supreme Court, a service of a copy of any pleading upon the opposite party, is conclusive evidence as to *him*, that the original has been duly filed. [*Smith v. Wells*, 6 *Johns. Rep.* 286.]

THE COURT, in accordance with the practice of the Supreme Court, set aside the default in this case without costs, but observed, that in the city of New-York, there could be no good reason, why the pleading should not in all cases be filed, before a copy is served upon the opposite party. In the country, where many attorneys reside at a distance from the clerk's office, it might be productive of inconvenience, to compel the attorney to put the original paper on file in all cases, before the copy is

served. And hence the reasonableness of the practice of the Supreme Court. But no such inconvenience can arise with respect to this court. They therefore directed the following rule to be entered by the reporter.

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*Regula generalis.*

"No copy of a declaration or other pleading shall be served upon the opposite party, until after the original shall have been regularly filed with the clerk of this court, and the appropriate rule entered in the rule book."

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MORRIS FRANKLIN AND J. T. S. SMITH

versus

ABRAHAM B. VANDERPOOL.

If the maker of a bank check has no funds in the bank upon which it is drawn, at the date of the check, it is not necessary for the holder to present such check at bank for payment, in order to enable him to sustain an action upon it against the maker.

The drawing of a check under such circumstances is, when unexplained, a fraud, which deprives the maker of all right to require presentment and demand of payment.

**ASSUMPSIT** upon a bank check, drawn by the defendant on the Franklin Bank of the City of New-York, made payable to cash or bearer, and delivered to the plaintiffs by the defendant.

The declaration contained a count upon the check, together with the common money-counts.

The cause was tried before Mr. Justice HOFFMAN, on the 12th day of July, 1828. On the trial, the plaintiffs produced and proved the check and read the same in evidence. They also proved, that the defendant had no funds in the Franklin Bank, either on the day of the date of the check, or at any time afterwards; and that for a year previous, he had not kept any account in that bank. The plaintiffs then rested their cause.

Upon this state of facts, the counsel for the defendant contended, that the plaintiffs were not entitled to a verdict. They insisted, that a *presentment* of the check at the bank, must also be proved; and that demand of payment and refusal were pre-requisite to any right of recovery. That the want of funds, at most, could only excuse the neglect to give notice of non-payment to the defendant, but could not dispense with the want of presentment.

This objection was overruled by the presiding judge: but the defendant was permitted to reserve the point for the consideration of the whole court; and the jury returned a verdict for the plaintiffs.

*Mr. Daniel B. Tallmadge*, for the defendant, now contended, August Term 1833.

I. That no action could be sustained on a check or bill of exchange against the drawer, until after presentment.

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A check is nothing less nor more than an inland bill of exchange, and is governed by the same rules which govern inland bills. With regard to these, nothing will excuse the want of presentment. Notice to the drawer will indeed be dispensed with, where he has no funds in the hands of the drawee. [3 J. C. 5. 5 *John. Rep.* 376. 6 *Cowen*, 484.] But want of funds is no excuse for a neglect to make presentment.

II. But it is said, that the *drawing* of a bill or the making of a check, where the drawer or maker has no funds in the hands of his drawee or banker, is a *fraud*. That, however, must always depend upon the circumstances of each particular case. Fraud is odious: it cannot be presumed, but must always be strictly proved. Whether the making of the check, in the principle case, was a fraud or not, should have been submitted to the jury. But the question was not raised at the trial; and the mere fact of a want of funds in bank, at the time of making the check, can never be considered as a fraud *per se*.

*Mr. J. Anthon*, for the plaintiffs *contra*, contended:

I. That the drawing on a bank, where the party had no funds, was a legal fraud. [*Bickerdike v. Bollman*, 1 D. & E. 408. 1 *Esp. R.* 4.]

II. As soon as the fact, of the want of funds was ascertained, the plaintiffs had a right to waive the check, and resort to the original demand: they may therefore recover upon the common counts. The check itself was evidence of money had and received. [12 *John. R.* 90. *Chitty on Bills*, 471.]

III. Presentment, under the circumstances of this case, was not necessary, and the drawer had no right to insist upon it; for the demand would have been unavailing and notice to the maker useless. [5 *Mass. R.* 172. *Chitty on Bills*, 318. *Ibid* 258.]

IV. Presentment is only necessary, where the action is brought against an *endorser*.

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OAKLEY, J. This was an action of assumpsit on a check, drawn by the defendant on the Franklin Bank, dated March the 11th, 1828, and payable to bearer.

The declaration contained a count on the check and the common money counts. The check was given in evidence, and the plaintiffs proved, that the defendant had no funds in the bank, either at the date of the check or at any time since, and has kept no account in the bank for the last year.

The defendant contended, that a *presentment* of the check at the bank for payment must be proved. The judge ruled that it was not necessary, and a verdict was taken for the plaintiffs. The defendant now moves for a new trial.

It seems to be settled, that a bank check is generally to be considered as an inland bill of exchange, and subject to the same rules. The contract created by a bill of exchange, between the drawer and payee is, that the bill shall be presented to the drawee, and payment demanded; and in case of non-payment, that notice thereof shall be given to the drawer. And the general rule undoubtedly is, that the payee cannot call upon the drawer, until he has demanded payment of the drawee. [*Cruger v. Armstrong*, 3 John. C. 5.] It has however, very often been decided, that if the drawer of a bill, at the time of drawing, has no funds in the hands of the drawee, the payee is not bound to give notice of the dishonour of the bill.

These decisions appear to rest on two grounds: 1. That the drawer cannot be injured, by the want of notice of non-payment of the bill, and therefore is not within the reason of the rule, which requires notice. And secondly, that the drawing of a bill without funds is a fraud; and that a person guilty of such a fraud, "shall not claim the protection of those rules, which were introduced, for the benefit of drawers acting *bona fide*." [*Bickerdike v. Bollman*, 1 D. & E. 408. *Clegg v. Cotton* 3 Bos. & Pul. 242.] The rule as thus laid down, is subject to qualification. The mere drawing without funds cannot, under all circumstances, be evidence of a fraudulent intent. And in many cases, the drawer would be exposed to serious injury by the want of notice, although he has no funds at the time of drawing. Bills are often drawn and

excepted, on the faith of funds, which are afterwards to come to the hands of the drawee, or in pursuance of a previous agreement of the drawee to accept.

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The true rule is that laid down by Chief Justice Marshall in *French v. The Bank of Columbia* [4 Cranch, 141.] If the drawer, at the time of drawing, has a right to expect, that his bill will be honoured (or in other words, if the bill be drawn in good faith) he is entitled to strict notice of its dishonour.

This qualification of the rule has been also made in several cases in the English Courts : [*Legg v. Thorpe*, 12 East, 170. *Cory v. Scott* 3 Barn. & Ald. 619. *Brown, v. Maffey*, 15 East, 221. *Claridge v. Dalton* 4, Mau. & Sel. 226.] And its correctness has been fully recognized by the Supreme Court of this state, [*Robinson v. Ames*, 20 J. R. 150.]

This seems to be admitted to be the rule as to the want of notice of non-acceptance or non-payment ; but it is said not to be applicable to the omission of a demand of payment. It is not perceived, on what ground any distinction between the two cases can be raised. It is as much a part of the contract created by a bill of exchange, that the payee shall give notice of its dishonour, as that he shall present it for acceptance. And every reason, which upholds the rule, that the want of funds of the drawer in the hands of the drawee, or the drawing in bad faith, will dispense with the performance of one part of the contract, applies equally to the other. When a drawer has no reason to expect, that his bill will be accepted, it is an idle ceremony to require it to be presented ; nor can the drawer be injured by the omission to do so.

Chitty in his treatise on Bills [248.] lays down the rule, that "the neglect to make a proper presentment, may, so far as respects the drawer's liability be excused, by the drawee's not having had effects of the drawer in his hands, from the time of drawing the bill to the time when it became due."

In *Legge v. Thorpe*, [12 East, 170.] it was decided, that a protest for non-acceptance of a foreign bill, need not be made or proved in an action against the drawer, if it appear, that he had no effects in the hands of the drawee, or no reason to ex-

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pect, that his bill would be accepted. In the case of *foreign bills*, it is a part of the contract arising from the Law Merchant, that a protest for non acceptance must be made. It is indispensably necessary, and cannot be supplied by any other proof. [*Chit.* 216. *Gale v. Walsh*, 5 *T. R.* 239. *Rogers v. Stephens*, 2 *T. R.* 713.] The protest is a formal declaration, that the bill has been presented and acceptance refused: and it is the usual, and indeed, the only evidence of the presentment of the bill, either for acceptance or payment. [1. *Phil. Ev.* 321. *note.* 2 *Phil. Ev.* 36. 6 *Wheat.* 574.] If then, in the case of a foreign bill, drawn under the circumstances before mentioned, a *protest* may be omitted, it would seem clearly to follow, that the *presentment* to the drawee (of which the protest is the only legal evidence) may also be omitted. The result of this reasoning is directly applicable to inland bills; for although no protest is necessary as to them, and they in that respect differ from foreign bills, as to the mode of proving a presentment, there is no difference between them, as to the necessity of *making* a presentment.

The rule, as thus derived from the English authorities, has received the express sanction of Chief Justice Parsons, in *Bond v. Farnham*, [5 *Mass.* 174.] In that case, that very learned Judge lays it down clearly, that when the drawer has no effects in the hands of the drawee, he cannot insist on a demand upon the drawee: for, says he, "he could not expect "an acceptance, and suffers no injury by the want of it."

I am of opinion from this view of the subject, that there is no ground for any distinction, in the present case, between an omission to give notice of the non-payment of the check, and an omission to present it to the bank. Upon principal and upon authority they stand upon the same footing.

It has been suggested, that if the want of funds in bank, at the time of drawing the check, is to be considered only as evidence, that it was drawn fraudulently or in bad faith, it ought to have been left to the jury to pass upon the fact of fraud. If the defendant had offered any proof to rebut the inference of fraud, arising from the circumstances of the



case, as they were in evidence, it would, no doubt, have been received. None such was offered. The defendant insisted, that upon the evidence, as it stood, the plaintiffs were bound to prove a presentment of the check, at the bank ; and he now insists, that he was entitled to the verdict of the jury. The Judge was clearly right in holding, that it was not necessary, as the proof stood, to show a presentment of the check. And there being no question as to the facts of the case, the jury would have been bound to find, that the check was drawn in bad faith. It is not important, therefore, to consider in what form the matter was left to the jury. The motion for a new trial must be denied.

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*Motion for a new trial denied.*

[E. Curtis, atty. for deft. B. Clark, atty. for plffs.]

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LOCKWOOD DE FOREST & WILLIAM H. DE FOREST,

*versus*

THE FULTON FIRE INSURANCE COMPANY,  
IN THE CITY OF NEW-YORK.

A commission merchant, having in his possession the goods of his principal or consignee, deposited with him for sale, has an interest in the property which entitles him to insure the same against fire, *in his own name*, to the full value of the goods.

In declaring upon such a policy, the pleader may set forth the facts as to the ownership according to the truth of the case, and conclude, "to the damage of the plaintiff."

A commission merchant is, to all intents, the *owner* of the goods in his possession as to all the world, except his principal.

An insurance effected by a commission merchant upon goods "as well the property of the assured, as held by them in trust or on commission," covers the whole value of the property, and not the mere interest of the party effecting the insurance.

At the trial, the Judge permitted the plaintiffs to prove, that it was the usage of commission merchants in the City of New-York, to effect insurance on goods consigned to them for sale, on commission, without express orders from their consignors. *Held*, that the proof of such usage was rightly admitted.

THIS was an action of *assumpsit*, upon three several policies of insurance against fire, tried before Mr. Justice HOFFMAN, on the 10th day of July, 1828.

The declaration contained a count upon each of the policies. The first was upon a policy for \$10,000, against loss or damage by fire, made by the defendants, and dated the 30th of April, 1827, upon goods and merchandise, hazardous and not hazardous, as well the property of the assured, *as held by them in trust or on commission*, contained in the four-story brick store and cellar, No. 82 South-street, in the City of New-York, for *one year* from the first day of May, 1827.

The second count was upon another policy of the defendants for \$5,000, against loss or damage by fire, dated the 5th day of February, 1828, upon goods and merchandise, hazardous and not hazardous, as well the property of the assured, *as held by them in trust or on commission*, contained in the store, No. 82. South-street, for *one year two months and twenty six days*, from the 5th day of February, 1828.

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The third count was upon another policy of the defendants, for \$2,500, against loss or damage by fire, dated the 5th day of February, 1828, upon merchandise, hazardous and not hazardous, the property of the assured, *or held by them in trust or on commission*, contained in the brick store, No. 81 South-street, in the City of New-York, for *four months* from the date of the policy.

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The averments, relative to the *interest* of the *plaintiffs* in the property insured and the *damage* sustained by *them*, were as follows: "And the said plaintiffs aver, that from the time of the "making of the policy of insurance aforesaid, and the promise and "undertaking aforesaid until and at the time of the loss herein "after mentioned, the said plaintiffs were *possessed of divers goods* "and merchandise, hazardous and not hazardous, *as well the* "property of the assured, *as held by them in trust or on commission*, "which were contained in the store and cellar, in the said policy "of insurance mentioned, to a large amount, to wit, to the amount of all the several sums in and by the said policy, and the "several policies herein after mentioned, insured thereon, or so "mentioned to be," &c.

"And the said plaintiffs aver, that after the making of the said "policy of the defendants, and during the time therein insured," &c., "the said goods and merchandise, in the said policy of insurance of the defendants mentioned, were by misfortune, "without fraud or evil practice on the part of the plaintiffs, burnt, "damaged, consumed and lost by fire," &c. "and that by such "fire the plaintiffs sustained loss and damage," &c. "to the amount "of all the sums insured on said goods and merchandise.

The defendants pleaded the general issue.

Upon the trial, several questions of law were raised by the counsel for the parties, which were reserved for the consideration of all the Judges upon a case to be made. Such facts, as are deemed material to a clear understanding of the points of law discussed, are extracted from the case, and make part of the history of the cause.

The execution of the policies, set forth in the declaration, was admitted by the defendants, and they were read in evidence. The two policies on property in the store, No. 82 South-street, contain-

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ed an acknowledgment of insurances, by the Howard Insurance Company, for \$10,000, by a policy bearing date the 15th day of November, 1827; and for \$5000, by a policy bearing date the 17th day of December of the same year. These last, also expressed, goods on *storage* and goods in *the yard* of the said store.

To prove their loss, the plaintiffs called Mr. James Gould as a witness, who testified that he was the book-keeper of the plaintiffs and had been so, for the last ten years: that the plaintiffs were *commission merchants* in the City of New-York, and were well known *as such*, to the defendants. That the property in the stores, Nos. 81 & 82 South-street, was burnt and damaged by a fire which took place on the 20th of February last: that at the time of the fire, there was a large amount of goods in the stores of various kinds, which belonged to the plaintiffs, or were held by them for sale on commission. That of the goods for sale on commission, the plaintiffs were in advance for the charges on some of them; on a part they had made advances, or had a lien for balances: on some of the goods, insurance against fire had been *ordered* by the principals of the plaintiffs, or the consignors of the goods; and that on others, no express orders for insurance had been given. The witness then enumerated and particularly described the goods, and also testified, that the property saved was sold a few days after the fire, with the consent of the defendants: the president and one of the directors of the company being present at the sale, and giving directions relative thereto. An account of the loss was made out and handed to the defendants on the 27th of February, 1827; and on the 23d day of March following, another statement of the loss, *accompanied by a notary's certificate*(a) was also delivered to the defendants. The witness fur-

(a) This was in compliance with the *ninth condition of insurance* attached to the "policy, which stipulated that "all persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company; and as soon after as possible to deliver in a particular account of such loss or damage, *signed with their own hands*, and *verified by their oath or affirmation*, and also, if required, by their books of account and other proper vouchers: "they shall also declare on oath whether any, and what other insurance, has "been made on the same property, and *procure a certificate* under the hand of a "magistrate, notary public, or clergyman, (most contiguous to the place of the

ther testified, that the statement above referred to, contained a true and accurate account of the loss sustained, and that the property was charged therein at the lowest market prices. He also made out three schedules of the property under the direction of the court and by consent of parties, in one of which the plaintiffs' own property was discriminated : in another, all such goods as were insured by express orders of the owners : and the third contained an account of goods held by the plaintiffs for sale upon commission ; for the insurance of which, they had received no express directions from their principals.

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The counsel for the defendant, in opening their defence, stated, that they were directed by their clients not to interpose any objections against a recovery by the plaintiffs for *all the property which was their own* ; nor upon that held by them for sale upon commission, *to the extent of their liens thereon* ; but beyond those limits, they insisted, that the plaintiffs were not entitled to seek a recovery.

The questions growing out of this objection, were not decided at the trial, but were reserved for the consideration of the whole court.

Several witnesses were then called, both by the plaintiffs and the defendants, to prove the value of the property and the extent of the loss ; and such of them as were *commission merchants*, were asked by the counsel for the plaintiffs : " What was the *usage* of commission merchants in the city of New-York, as to effecting insurance on goods consigned to them for sale on commission, against loss and damage by fire, without express orders from the consignors of the goods, to effect such insurance ?" To this question the counsel for the de-

" fire and not concerned in the loss,) that they are acquainted with the character and circumstances of the person or persons insured ; and that having investigated the circumstances in relation to such loss, do know, or verily believe, that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire, loss and damage to the amount therein mentioned : and until such proofs, declarations and certificates are produced, the loss shall not be payable : also if there appear any fraud, or false swearing, the claimant shall forfeit all claim by virtue of this policy."

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defendants objected ; but their objection was overruled, and the decision excepted to by the defendants.

The Judge then, with the assent of both parties, directed the jury to return a verdict in favour of the plaintiffs for a sum sufficient to cover their whole claim. They were also directed to find specially as to the usage which the plaintiffs attempted to prove ; to find the value and amount of the articles lost or damaged, separately ; and to reduce the prices of the goods, if they should find them credit prices, by a discount of interest, to a credit of 60 days from the time the proofs of loss were delivered. (b.)

This verdict was to be subject to the opinion of the court on the questions reserved ; and to be modified and adjusted under their direction, according as they should decide on the extent of the liability of the defendants.

With these directions the jury returned a verdict in favour of the plaintiffs for \$18,000, founded upon the principles laid down by the court. They also found, " in favour of the custom of effecting " insurance on goods consigned or held in trust, without the necessity of special orders being given to that effect, to the commission merchant."

The cause was now argued by *Mr. D. Lord* and *Mr. D. B. Ogden*, for the plaintiffs, and by *Mr. Staples* and *Mr. Griffin*, for the defendants. The plaintiffs presented the following points :

I. That the defendants were liable in this suit to pay to the plaintiffs, all such damage as happened by fire to the property held in trust or on commission, specified in the policy, without regard to the state of their advances, or claims against the persons for whose account it was held by them in trust or on commission.

II. The evidence of the usage of trade, offered by the plaintiffs, was rightly admitted.

(b) This had reference to the *tenth condition of insurance* annexed to the policy, which stipulates that " payment of losses shall be made in 60 days after the loss " shall have been ascertained and satisfactorily proved, without any deduction " whatever."

*Mr. Lord.*

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I. The plaintiffs in this case are commission merchants, and as such were known to the defendants. The testimony produced at the trial clearly proves, that it is *usual* for commission merchants to insure the property placed under their charge against loss or damage by fire ; and the plaintiffs, as faithful agents, were bound to exercise the same discreet care, toward the property of their correspondents, which they bestowed upon their own.

It is admitted by the counsel for the defendants, that the plaintiffs are protected by the policy to the extent of their advances ; and also in those cases where they received orders from their principals to insure ; because, in such cases, they have an *interest* : being themselves liable to their consignors for the consequences of neglect.

Where express orders to effect insurance have been received by a commission merchant, there can be no doubt of his right to effect the insurance in his own name. If this be true in the case of *express* instructions, implied orders may be considered as tantamount to the same thing ; for *general usage* is equivalent to a positive order. The plaintiffs were bound to do what is usually done by commission merchants ; what *prudent* men do for the protection of their own property, and what they themselves did in this very case with their own goods.

II. The defendants, at the trial, objected to the evidence offered by the plaintiff, to show the custom among commission merchants in New-York, to insure the goods of their principals ; and one of the first inquiries is, whether such evidence was admissible.

It was offered by the plaintiffs as a mere fact to show the course of trade ; to show what is always done, and *expected* to be done, by commission merchants, and what was of course expected from the plaintiffs by their consignors. A usage to sell on credit is mere evidence of an implied authority to give credit. So, in this case, we offered proof of the custom, as evidence of an implied authority to insure, which may be considered as tantamount to a special order. This usage is also admissible to show a rule of diligence and of duty. It has been admitted in analogous cases, and

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 was properly admitted in this. [*Palmer v. Blackburn*, 1 *Bing.* 61. *Robertson v. French*, 4 *East*, 130. 135. *Frith v. Barker*, 2 *John. R.* 335. *Coit v. Com. Ins. Co.*, 7 *John. R.* 385. *Scott v. Bourdillion*, 5 *Bos. & Pul.* 213. *Park on Ins.*, 12. 116. (*Murray v. Sherry*,) *Renna v. Bank of Columbia*, 9 *Wheat.* 581. *Astor v. Union Ins. Co.*, 7 *Coven*, 202.]

III. The interest of the plaintiffs in the goods under their charge was at least equal to that of a trustee; and if a trustee could recover the whole value of the property insured in his own name, the plaintiffs can recover in the present instance.

The policy itself is a contract of liberal indemnity, and is held out as such to the world by the underwriters in their own proposals. The words used in the contract, being the words of the defendants, are to be construed most strongly against them; and the construction to be given to these instruments is always liberal, in cases of indemnity, although strict in cases of fraud. Here the defendants have been paid for assuming a given risk: the contingency which the parties contemplated has happened; the property was subjected to the expected peril, and none other, and the defendants are bound to make good the loss.

The words "*held in trust*," and "*held on commission*," are to receive the same construction, because they are used in the same instrument, and in the same connexion. Suppose the whole property had been held on *trust*, instead of *commission*, would it not be covered to its full value? But has the trustee an equal interest with the commission merchant? The trustee is not the beneficial owner; but is the owner for the purposes of legal protection merely, and is answerable over, for the faithful discharge of his trust.

The commission merchant is also an owner for the purposes of legal protection, with a greater interest and a higher authority: for he has a right not only to *hold*, but to protect the property, and sell it. Both are bound to act in the manner usual among prudent men as to their own affairs, and to bestow the same care upon the property entrusted to their charge, as upon their own. If, therefore, the plaintiffs, as trustees merely, would be covered by the terms of the policy, they certainly ought to be protected,



in the present case, by the additional words, and the analogous nature of the two cases. August Term 1893.

IV. A commission merchant in possession of property, with authority to sell, is the *owner* as to all the world, except his consignor : the insurance, therefore, covers the *whole* property, and, in pleading, the loss may be laid as accruing to the plaintiffs. De Forest v. The Fulton Fire Ins. Co.

1. In cases of sale, the commission merchant sues in his own name, describes the goods as his own, and recovers the full value in damages.

2. If the goods are taken from him, trespass *de bonis asportatis*, or trover lies, and the property may be averred to be in the commission merchant, who recovers its full value ; being subject to account with his principal. This principle is well established. [*Lyle v. Baker*, 5 Binn. 457. *Action against a Sheriff for attaching goods on which the plaintiff had made advances*, 1 B. & A. 59.]

3. If the property be stolen ; in an indictment for theft, the goods may be laid as the goods of the plaintiff. [2 Chit. Crim. Law, (Amer. ed.) 947, 8. and the cases cited there.]

4. A common carrier is an insurer against fire. Suppose the plaintiffs had delivered the goods to a common carrier, and they had been destroyed by fire : could they not recover the *whole value* of the property of the carrier ?

5. At common law, an action on the case for negligently keeping fire by which one's house is burnt, will lie against his neighbour. Suppose such an action brought by the plaintiffs, could they not recover the full value of the property in damages ? [Com. Dig. *Action on the case for negligence*, A. 6.]

6. In an action against the Hundred for robbery on the statute of Winchester, a servant robbed of his master's goods, in the absence of the master, may recover the whole value, laying the property in himself. [2 Saund. R. pt. 2. 380. (n. 15.) *Combes v. Bradbury*, 12 Mod. 54. *Same case*, 4 Mod. 308. *Peake's Ev.* 278, &c.]

The common law, therefore, clearly treats the person having a special ownership of property as possessed of an interest which entitles him, on every occasion, to recover its full value, (subject to account for the same to his principal,) because being present, he is bound diligently to protect and take care of the property,

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V. Such being the legal relation of the plaintiffs to the property held by them on commission, and such being the usage, what are the defendants to be understood as insuring—the full value of the property, or the plaintiffs' interest therein merely? The plaintiff, in all other cases, is entitled to recover the whole amount; and why are not the defendants placed in the condition of every other party who is liable to the plaintiffs for fire or accident? Is any thing more required to create an insurable interest than a special property in the goods insured? An insurable interest is even less than a special property. [*Buck & Hedrick v Chesapeake Ins. Co.*, 1 *Peters' Rep.* 162.]

VI. The words of the policy, "their own property, or held by them on trust or on commission," were evidently intended by them to cover property in some sense not their own absolutely. The insurers undertake to make good to the assured, all such loss as should happen to the property *above specified*. The very words import an obligation to replace the goods, and nothing can be inferred from them indicative of the plaintiffs' particular interest in the property insured.

The loss, by the terms of the policy, is to be estimated according to the true and actual value of the property insured. This cannot be confined to the mere duties, charges and advances made by the plaintiffs, but must refer to the fair market price of the goods.

By the third condition of insurance attached to the policy, "goods held in trust or on commission are to be declared as such, otherwise the policy will not cover such property." What property is protected when the policy covers goods on trust? The interest of the trustee only, or the whole value of the property? And why does not the same rule apply to goods held upon commission, when such property is expressly described and covered by the words of the policy?

There is no policy of law opposed to a recovery by the plaintiffs, and there is no possibility of fraud. The person holding the property is known, and no voluntary or fraudulent burning is to be expected; besides, there can be no recovery without proof of loss to the amount claimed.

As to *double* insurances, they are not to be anticipated, for it is the usage of commission merchants to insure; and there can be no more danger in this respect from property held upon commission, than that held upon trust. The plaintiffs are accountable over to their principals, as every bailee with a special property is accountable, and there is no reason why they should not recover in the present action.

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*Mr. Staples, contra*, for the defendants.

The decision of this case depends upon the true construction of that clause of the policy in which the interest of the assured is described.

On the part of the plaintiffs it is insisted, that all the property in the store destroyed to the amount of the sum insured, is covered by the policy, whether the plaintiffs had any interest in it or not; or whether ordered to insure it or not. On the part of the defendants it is admitted, that the plaintiffs have a right to recover for the value of their own property destroyed, and to the amount of what they may have advanced on the property of others, in store, and for such as they were requested to insure and have insured accordingly: but for property in which the plaintiffs had no interest, and which they did not own, and were not requested to insure, the defendants insist the plaintiffs have no right to recover.

Before we examine the clause of the policy in question, we remark, first, that it has been insisted, that every commission merchant is bound, without any particular orders, to get the property of his correspondents in his possession insured. This is incorrect; it is neither the law nor the practice; if it was the law, it would make every commission merchant the insurer of all the property consigned to him while in store; and all the property thus situated, which has been destroyed in this city by fire, within the last six years, the commission merchants to whom it has been consigned must pay for. It is no part of the duty of a commission merchant to get the property consigned to him insured, unless requested so to do. [3 Chit. Com. L. 357. 363. Phil. on Ins. 44. Paley on Ag. 18. Smith v. Lascelles, 2 Term, R. 187.]

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2. There is no custom proved or found in this case which can materially affect the decision of the main question.

Commission merchants, we admit, have been in the habit of insuring their customer's goods which they hold as security for advancements to protect themselves in case of loss or failure. But no instance has been proved, nor have the jury found, that where the commission merchant had no interest in the goods, and was not requested to procure insurance, that he has procured insurance, and in case of loss collected it and paid it over. The insurances which have been made, have been merely for the commission merchants' own security.

Such a custom would be an anomaly in the commercial world. It is not to be supposed that the merchants of this city, contrary to law, and contrary to the practice of the commercial world, would adopt such a custom; and the finding of the jury as well as the evidence, are satisfied by the well-known fact that many commission merchants for their own security, are in the habit of insuring an amount, which will cover all their advancements upon their correspondents' goods.

With these remarks we dispose of all that part of the argument which, in our judgment, is not immediately connected with the merits of the controversy.

I. On the part of the defendants we insist, that the plaintiffs cannot recover beyond their interest in the goods created by ownership, by advancement, or by an order to insure; the disobedience of which, would have subjected them to pay for the goods.

II. In every policy against fire there is a personal trust reposed in the insured. This trust is of a very confidential, as well as delicate nature. It never is, and never can be, reposed in a person not named in the policy; much less in a person unknown. The very nature of the subject, as well as the terms of the contract and the policy of the law, prove the existence, and show the character of this trust. In case of personal property insured, the insurance attaches to no particular invoice of goods, but upon any goods the property of the insured, which happen to be in store at the time of the fire. [*Park on Ins.* 452.] Between the date of the insurance and the fire, the goods may have been destroyed many

times. This shows the nature, as well as the extent of the confidence reposed in the insured.

III. In all insurances against *fire* gaming policies are considered as against sound policy. [4 *Mass. R.* 336. 2 *Marsh. Ins.* 787. 2 *Atk.* 557. *Phil. on Ins.* 27. 2 *Mason*, 369.] No man can insure beyond his interest. This is a cardinal principle. If the insured insures another person's property, he is bound to name that person to the insurers, that they may know his character.

IV. It is said that agents and factors may insure the property of their principals. This is true; and all that right is completely satisfied by giving this policy the construction we give it. But no case or principle of law can be found, giving a right to the factor to insure the interest of his principal without orders, and where he has no interest. Such a practice would be mere gaming. [*Phil. Ins.* 43.]

V. But it is urged that *trustees* may insure, and that they have an insurable interest. This is admitted; and to the extent of their interest they may cover, but not beyond, unless they state that interest, and the owner; that the insurer may know whose property he insures. [13 *Mass.* 267. 1 *Peters, R.* 161.] Where a person insures as trustee, and says no more, the words of the policy are fully satisfied by the paying the trustee, for his interest in the trust estate.

A policy like the present is a mere personal trust, not an insurance of the thing. It is against any injury which may happen within a given time to the person or any of his property, or any interest he may have in any property, of this description. But the construction contended for, would open a wide door to fraud, and destroy all confidence between the assurer and the insured. There may be double insurance; the owner may have disposed of his interest to a person whom the assurer would be unwilling to insure, and the loss when paid is liable to misapplication.

Besides, the insurance would be constantly changing; to-day it would attach to the property; to-morrow there may be no property to be protected. The insurer is exposed to hazards not contemplated, and a contract is set up which he never sanctioned.

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This deference proves that the underwriters never deemed that the plaintiffs' claims could extend to this extreme point, and they have come here to state their own views of their own contract, according to its terms and according to its spirit.

The plaintiffs themselves have cautiously stated their own claims. The declaration sets forth the insurances as made, and according to the facts of the case, and then concludes "to the damage of the *plaintiffs*." Now, the declaration itself shows that the whole extent of the loss could not damage the plaintiffs, for *their* interest did not extend thus far. Their interest was bounded by their claims upon the property, and this amount the defendants have always been ready to pay. We insist that the plaintiffs cannot, under the pleadings, or under a fair construction of the policy recover any amount beyond their own loss, and must be limited in their claims to the extent of their own interest in the property.

*Mr. Griffin*, on the same side.

There are two questions in this case, of importance to be examined. 1. Do the *words* of the policy and a fair construction of its terms, go beyond the interest of the plaintiffs? 2. Can the plaintiffs upon *these pleadings* recover beyond that amount?

The finding of the Jury in "favor of the custom," cannot assist the plaintiffs, because it does not show that it is usual for the commission merchant to insure beyond *his own interest*. At all events, it does not indicate, that it is usual to insure the interest of the principle in the name of the agent. Besides, there is no proof that the insurance was ever authorised by the principals. The defendants offer to pay according to the custom: that is, they offer to make good to the plaintiffs the loss sustained by them upon *their own property*, and the full amount of *their interest* in the goods "held in trust and on commission."

1. The policy according to its true and fair construction, covers nothing beyond the interest of the plaintiffs. They *only* are insured. Where other interests are intended to be protected, appropriate words for that purpose are always introduced. [*Phil. Ins. 57. 61.*]

In this case, the words descriptive of the property, are only intended to obviate the effect of the third condition of the policy. The agreement is, "to make good to the *assured*;" and the provisions against other insurances extend only to them. But the *principal* may insure, [*Locke v. North Amer. In. Com.* 13 *Mass.* 61.] and thus the property may be doubly insured.

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The clause against assignments, shows that it is the *interest of the assured*, and not the property itself that is covered; and the notarial certificates, required by the ninth condition, show, that the loss must have been sustained by the *assured*.

III. The declaration does not authorise a recovery, for any interest, but that of the plaintiffs. A party who seeks to recover on a policy made by him, for the *benefit* of another, must aver in his declaration, *the real party in interest*. [*Bell v. Ansley*, 16 *East*, 141. 143. *Cohen v. Hannam*, 5 *Taunt.* 101. *Wolff v. Horncastle*, 4 *Bos. & Pul.* 316. *Davis v. Boardman*, 12 *Mass. Rep.* 80. 83.] Here, the averments of interest, the affidavits and notarial certificates are confined to the *assured*. The answer, and the only answer that can be attempted is, that the plaintiffs had the *legal interest* in the property insured. In the case cited from Peters' Rep. [*Buck v. Ches. In. Com.*, 1 *Pet.* 162.] the captain had the legal interest. So in the case of *Bartlet v. Walter*, [13 *Mass. Rep.* 267.] the hirer for the voyage had the legal interest *pro hac vice*. A commission merchant has not the legal interest in the whole property: he is a mere agent, and a breach of duty, in not insuring, does not create an insurable interest. His power may be revoked at the pleasure of the principal, and goods under his charge may be sold by an execution, subject to the factor's lien. This lien is not transferrable: it is a mere personal claim. [*McCombie v. Davies*, 7 *East*, 5.]

The counsel for the plaintiffs are driven to the bold position, that a mere bailee, may insure the property of his principal, in his own name—sue upon the policy, and aver interest in himself! This is the only position on which they can rest. But a bailee has the legal estate, only as against *wrong doers*. The special interest does not support the averment in the declaration; and under these pleadings the plaintiffs cannot recover. The captain or

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supercargo of a vessel may make advances, and have a lien upon the owner's property : but will the counsel for the plaintiffs contend, that the captain or supercargo, would have a right to insure the property of their principal *in their own names*, and in case of loss, to recover upon a declaration which averred the interest to be in the agent ?

The doctrine must be carried to this extent, to support the claims of the plaintiffs, in the form presented by this declaration.

*Mr. Ogden*, in reply.

The principal subject of inquiry, in this case is, as to the *true construction* to be put upon these policies of insurance ; for upon that construction must depend the decision of the court.

The jury have found, that it is the usage of commission merchants, to effect insurance upon goods consigned to them for sale ; and of this usage the defendants were fully aware, at the time of executing the policies.

By the terms of the contract, the assurers undertake "to make good unto the assured" "all such loss or damage" "as should happen by fire *to the property*" specified. The *interest* of the plaintiffs is never mentioned in the policy : while the *property* in the stores is constantly referred to.

This contract is made in reference to the conditions of insurance attached to the policy. The third article stipulates that "goods held in trust, or on commission, are to be declared and insured as such." What is the meaning of these expressions ? Has it not reference to the words used ? and can they bear any other interpretation, than that, if the goods held in trust or on commission are "declared such," they are, *of course*, insured ? Property held by a merchant for sale is constantly changing. The insurance is not effected on any *specific* property, but on property *generally*. The *amount* of goods or merchandise, specified in the policy is insured ; and it is a matter of no importance as to whom the same may belong.

One of the counsel for the defendants suggests, that an insurance against fire, may be considered, as "*in personam* ;" while a marine policy is a contract *in rem*. But this distinction is not well



founded. May not a boatman, or the owner of a vessel engaged in the regular business of transportation upon our rivers or canals, effect a policy *upon time*, which will be effectual to cover all property received on board of his vessel within the period specified, and protect it against all risks for which he is liable to his bailor, or the person for whom he receives the property ?

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But we are asked, what disposition is to be made of the money when it shall be recovered ? That is a question between the consignor and consignee solely, and the underwriters have nothing to do with it. The commission merchant must undoubtedly account for the money to his principal ; but that question can, in no way, affect the *contract* between the parties now before the court.

The policy under consideration has been likened to a *wager policy*, and even treated as such, by the counsel for the defendants ; and the risk of *double insurance* has been urged as an argument against our recovery.

A *wager policy against fire* is void, I admit : it ought not to be countenanced for a moment by the court ; and if these contracts can be considered as *wager policies*, let them be abandoned. But there is no foundation for the suggestion ; for the plaintiffs have, at all events, an interest to a certain extent, in the subject matter of the insurance.

The danger to be apprehended from double insurances, has nothing to do with the interpretation and true construction of this contract. If the defendants have made an agreement which exposes them to such risk, it is their own fault, and this objection cannot be set up by them, to invalidate the contract. But the danger arising from this source is altogether imaginary ; for the defendants may come forward at the trial and show, that *other* insurances upon the *same* property have been effected, in the same manner as they may be proved in cases of marine insurance.

But it is said, that we are not entitled to recover, because we cannot comply with the requisitions of the *ninth* "condition of insurance" attached to the policy. This ninth article or condition is a part of the policy, I admit ; but it is a *printed* part, and if

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there be any discrepancy between this and the *written* clause upon which we rely, the former must give place to the latter. But why can we not comply with the requirements of this ninth condition? The plaintiffs in their statement, give an account of the loss sustained; not of *their own* loss, I admit, but of the *whole* loss. This is a substantial compliance with the conditions of this article.

But it is further objected, that if the plaintiffs are entitled to recover upon the abstract principle, still they cannot recover upon these pleadings as they now stand.

This question brings us back to the consideration of the proper construction to be put upon this contract. Its true import is, that the defendants *agree* that the assured shall be *considered* as *owners* of the property to all intents and purposes. The question of *ownership* was by no means to arise; and the *plaintiffs* were taken to be the owners, for all purposes as between the *assurers* and *assured*. We have made our averments, then, according to the facts and according to the words. In trover or trespass the declaration would conclude "*to the damage of the plaintiff*," although his interest in the property might be only that of trustee. But the true answer to the objection is, that the plaintiffs *are* the owners, as to all the world, except their principals or consignors.

It might be urged, that the usage of the commission merchant to effect insurance, imposes an *obligation* upon him to protect the property committed to his charge; and it may be a delicate subject of inquiry, whether he be not liable for all the consequences of a neglect to insure. If this be so—if the plaintiffs were *bound* to insure; then, clearly, according to the case cited from the 13th of the Mass. Reports, they had an insurable interest.

JONES, Chief Justice.

This is an action on a policy of insurance, to recover for loss and damage to goods by fire. By the terms of the contract, The Fulton Fire Insurance Company, the defendants, insured De Forest & Son, the plaintiffs, against loss or damage by fire, to the amount of \$10,000 dollars, on goods and merchandise, hazardous and not hazardous, as well the property of the assured, as held by them in trust or on commission, contained in the store No. 82

South-street, for the term of one year. And the insurers promise and agree to make good to the insured, all such loss or damage, as should happen by fire to the property ; such loss or damage to be estimated according to the true and actual value of the property at the time the loss should happen. A fire happened within the year, by which loss and damage was sustained on goods and merchandise, partly the property of the plaintiffs, and partly held by them on commission, then in the store described in the policy, to a large amount. The right of the assured to indemnity is admitted ; and the question is upon the extent of the liability of the insurers for the goods held on commission ; or, in other words, what the insurable interest of the plaintiffs was therein. The plaintiffs insist upon the right to recover the full amount of the loss and damages to those goods by the fire ; and the defendants contend, that they are bound to indemnify to the amount only, of loss, sustained by the plaintiffs in their own right thereby.

It is admitted that they had an interest in the goods they held on commission, and are entitled to recover to the amount of their advances thereon, with interest, and their mercantile commissions and charges as factors. But the insurers insist, that those were the only interests the plaintiffs had at risk at the time of the fire, and that all they can claim is an indemnity to themselves for their own loss.

The plaintiffs are insured on goods held by them on commission. they had no beneficial interest or right of property in those goods beyond the amount of their liens and just claims, for their commissions on the sale, and the reimbursement of their advances and charges on account of the principals, to whom the goods belonged. They were the consignees and factors of the general owners, with powers to sell ; and in that character they had the right of possession, and the actual possession of the goods, and a special ownership against all the world, with the exception only of the principals, which entitle them to hold and dispose of the goods—to reclaim them if improperly usurped, and to maintain actions of trover for them as their own, if they chance to come into the possession of others, and are wrongfully detained. And whether that possession and

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special ownership gave them an insurable interest under this special contract or not, is the material question. There can be no doubt of the right of the factor to insure for his principal : and admitting such insurance to be made of his own accord, and without the orders, express or implied, of the principal, the act of the agent might be affirmed, and the contract rendered binding on the insurers by the subsequent assent of the principal. But in such case, the insurance being made for the principal, the claim for the loss must also be for the principal, and not for the factor ; and the interest must be averred in pleading, and shown in proof, to be in the consignor. But the question we are now to consider is, not whether the factors had the right or the power to insure the interest of their principals, but whether they had such an insurable interest in the goods which belonged to their principals, but were held by them on commission for sale, as to give vitality to a contract of insurance upon them in their own names as for their own account. For this is an insurance by the plaintiffs for themselves, and they must show an insurable interest in themselves to entitle them to recover for the loss. So the plaintiffs themselves treat the contract on which they sue. The declaration proceeds on that ground : it predicates the loss it claims, as the loss of the plaintiffs themselves, and substantially avers the interest to have been in them. The proof of the averment was, that they held goods on commission for sale, as factors, which were deteriorated by the fire to the amount of the claim. To which the defendants object, that the actual interest of the insured in those goods, was the amount of the advances made on them, and the commission that would have been earned by the sale of them ; and that the recovery must be limited to that amount. And it is clear, that to entitle them to recover the entire amount of the loss upon those goods, it must be shown that the possession and special ownership established by the proofs in the cause constituted an insurable interest, and that they had a right to insure that interest in their own names, without any further disclosure of the peculiar nature of the interest, than that they held the goods on commission.

It is well settled, that an insurable interest, in mercantile language, does not necessarily import an absolute right of property in the thing insured. A special or qualified interest is equally

the subject of insurance ; and it has often been determined, that each distinct interest in the same subject, may be protected by a separate policy on the subject, for the party interested in it. The mortgagor and mortgagee may both insure ; so may the trustee and the *cestui que trust* ; and so may every party who has any special interest to protect, or who represents the property as the qualified owner of it ; and in the latter class of cases, the sole question is, whether the special interest alone, or the entire subject is covered by a policy effected upon the property in the name of the qualified owner. And that question may turn upon the nature of the ownership or interest, the purposes for which the property is held, and the powers incident to the relations of the special owner, or necessary to the safety of the insured premises ; or it may be settled by usage and course of dealing.

It has been held, that captors have an insurable interest in the prize before condemnation, [*The Omoa case, Park on Ins.* 358.\*] on the ground of possession, and the inchoate right of property acquired by the capture, and the necessity of permitting them to insure the property, which the original owner had no longer any interest to protect. And in the case of *Stirling v. Vaughan*, [11 *East* 619.] the same general question came under review, and the court decided that the prize might be insured by an agent, and interest averred in the captors : and they put the case substantially upon the ground of actual possession of the property, with the general right to retain it against all the world, subject to the release of it by the crown to the original owners before condemnation. But the case of *Lucena v. Crauford* [3 *Bos. & Pul.* 75.] is yet stronger. In that case, commissioners appointed under an act of parliament, for the custody, care, sale and management of such ships and cargoes, belonging to subjects of the United Provinces as should be brought into the ports of the United Kingdom, were held to have an insurable interest in Dutch ships and cargoes on their passage to England, which had been taken by a British cruiser, under the instructions of the admiralty, and sent in to be detained provisionally. It was a case in the Exchequer Cham-

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ber, upon a writ of error from a judgment of the court of King's Bench. That judgment was in favour of the assured, and it was affirmed by all the barons of the court of exchequer and judges of the common pleas, except Mr. Justice Chambers. The judges, who affirmed the judgment, assimilated the commissioners under the act to trustees and factors. They all held, [and Chambers, the dissenting judge, concurred with them in holding,] that it was not necessary for an assured, to have a beneficial interest in the property insured ; but that it is sufficient if he be clothed with the character of a trustee, an agent or a consignee ; and that if the commissioners could be considered in either of those capacities, they had an insurable interest ; and it was held, that they might be considered as trustees for the crown, or for the persons who should be ultimately entitled to the property, as general agents, for the purpose of disposing of the property on its arrival, or as statutable consignees ; and that it was not necessary that the particular *cestuy que trusts*, should be ascertained at the moment of insurance. That they might be trustees for persons unknown, or for objects not precisely ascertained at the time the insurance was effected ; yet, if they were trustees for any purpose, they acquired from that character a sufficient interest in the trust property to insure. It was objected in that case, that the Dutch commissioners did not resemble consignees, because those commissioners were directed to sell and dispose of the property entrusted to them, according to the instructions they should receive from government. But to this the judges answer, that many consignees receive goods with orders to attend to the directions of the consignor as to their disposal, and yet they were not the less able to insure. The commissioners, it was conceded, would not have been at liberty to disobey the directions of the government, from whom their commission was derived ; but it was observed, that in default of directions they, like other consignees and trustees, had the sole management in themselves, and might act upon their own judgment.

This case has a direct bearing upon the question before us, and if the principle of it be correct, would seem to settle the present controversy. The judges throughout, assert it as an established

principle, that a consignee of goods for sale, may insure the property he holds under the consignment, as his own, and that he derives his insurable interests from the relations in which he stands to the property as consignee, and his possession of it and power over it, in virtue of that relation, and not from any orders or authority, express or implied, from the consignor to insure. The consignee is coupled with the trustee of property, and the same general and unqualified power to insure, is ascribed to both. Now, the insurable interest of a trustee, in the trust property, is admitted. How, then, if the opinions of these judges are to be relied on, can the insurable interest of the consignee in the goods he holds on consignment, or sale, be questioned? In the case of the Dutch commissioners, the court went much farther than we are required to go. It was there held, that a marine insurance on the Dutch ships and cargoes under detention, or provisional capture, might be insured by the commissioners against maritime risks on their passage, and before they came into the possession, and under the charge, of the commissioners. It is sufficient for the decision of this cause, that the consignee should have the power to insure the goods, entrusted to him for sale, and which he has in his actual possession and charge, against loss or damage by fire, in his own warehouse. And without such a power, he will be unable to extend the same protection to the goods of his principals, that common prudence requires him to give to his own property.

But it may be said, that the case of *Lucena v. Craufurd* was afterwards reversed by the House of Lords: and the fact is so. But that reversal was upon the ground, that one of the vessels for which an indemnity had been recovered, was not lost until after hostilities had been declared against Holland, whereby the vessel was impressed with the character of *enemy's* property; and if she had arrived in England, could not have come into the possession of the commissioners, whose powers were adapted and restricted, to the case of provisional capture of the property of friends, authorised by the British government, from motives of policy, under the peculiar circumstances of Holland at the time; but no opinion was expressed as to the insurable interest of the

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commissioners in the property which was lost before the declaration of hostilities, and therefore might have come into their possession as commissioners. And it was agreed that the action was, at any rate, sustainable for the loss of the ship on the count which averred interest in the king. On these grounds a *venire facias de novo* was ordered, in order to bring the case more fully before the court. That reversal, therefore, did not unsettle the principle for which I contend; and the views taken by Lord Eldon, whose opinion was followed by the Chief Justice of the King's Bench and the Chancellor, and adopted by the house, strongly support it.



He recognizes the principle, that the actual possession of property, coupled with the right of possession, may confer upon the holder, who has neither the legal title, nor the absolute interest, the power to insure it as his own; for he admits that the king has an interest in a prize before condemnation, for the purpose of insuring the property. He would seem, indeed, to dissent from the doctrine, supposed to be laid down in the *Omoa* case, that the expectation of a grant from the crown, gives the captors such an interest in the arrival of the prize, as to entitle them to insure it, in their own names, and for their own benefit. But he puts his dissent upon the ground, that the insurable interest was in the king, as the person who had the *jus possessionis*, and that the possession of the captors, notwithstanding the liabilities they were under, and their just expectation of a grant from the crown, were still held by them, as agents of the king, as their principal, and could only entitle them to insure the property in his name, and for his benefit. And in the notice which is taken of the proposition, assimilating the commissioners to trustees, consignees and agents, the insurable interest of the trustee in the trust property is expressly acknowledged, and the right of the consignee to protect by insurance, the goods he holds on consignment for sale, is impliedly conceded. A trustee, his lordship observes, has a legal interest in the thing, and therefore may insure: and so, he adds, a consignee has the power of selling. He here refers to factors, who hold the goods of their principals for sale on commission, and obviously considers the right to insure as incident to the ple-



nary powers of such factors, over the goods entrusted to their agency. For he observes, that there are different sorts of consignees : those who have the power to sell, manage and dispose of the property, subject only to the rights of the consignor, and those who have a mere naked right to take possession of the goods. And he adds, that he would not say that the latter might not insure, if they state the interest to be in their principals.

These comments upon the rights and powers of these two classes of consignees, cannot, I think, be misunderstood. The fair import of them is, that the consignee with the power of sale has an insurable interest in the property he holds under consignment, and may insure it in his own name, and as his own ; but that the consignee who has the mere naked right to take possession of the property, has no insurable interest in it ; and though he may insure it for his principal ;—yet, to give validity to the contract, he must state the interest to be in the consignor. In no other sense are the expressions of his Lordship intelligible, or would they have any bearing upon the question before him. And taking them in that sense, they sanction the principle distinctly affirmed by the court of Exchequer Chamber, that a factor, clothed with the power to sell, has an insurable interest in the property held by him under the consignment, and may insure it in his own name. This conclusion derives additional force, from the opinions of the judges, who were called upon for their opinions, and severally expressed them to the house on the point. The fifth question put to them was, in substance, whether the plaintiffs, as commissioners, had such an insurable interest in the ships and goods which the policies purported to cover, as to enable them to effect a legal and valid insurance thereon, for their own use, benefit and account, as commissioners. And to this question all the judges, except Justices Chambre and Lawrence, answered in the affirmative, as to all the ships. They assimilate the commissioners with consignees ; and they assume, as an acknowledged principle, that a consignee, without any beneficial interest in himself, is agent for the consignor, and may insure for his benefit. Again : they say that no one ever questioned but a consignee or agent, of the description spoken of by them, (and they speak

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of a consignee for the management and sale of goods) might make an insurance for the benefit of the owner and person entitled, and for whom he, as consignee, is authorised to act. The parallel between the commissioners and a consignee runs through the opinion; and the right of the commissioners to insure in their own names, and to aver interest in themselves, is defended on the strong analogy approaching to identity with consignees, whose power to insure the goods consigned to them, and held by them for sale, is assumed as indisputable. And in this view of that point, Chambre and Lawrence, the two dissenting judges, concur with the rest of the judges. Chambre, J. observes, that a consignment is a species of mercantile conveyance operating upon the particular effects consigned; and Lawrence, J. substantially admits the insurable interest of a consignee for sale.

From this case, then, which, from the discussion it underwent, and the judicial opinions brought to bear upon it, is entitled to the highest consideration, I deduce the proposition, that a consignee, with general powers to manage and sell the property, has an insurable interest in the goods in his possession as consignee, and may insure them in his own name, and aver the interest in himself.

I have been induced to examine these cases so much at large, not from any direct decision they contain on the subject I am discussing, but because they recognise so clearly and so fully the insurable interest of a consignee in the goods consigned to him for sale; a principle, which if sound, must, I think, be decisive of the question in this cause. And I regard these cases as much stronger, from the consideration that the important principle, so material to the validity of the insurance before us, is not discussed, or treated as a doubtful point, or an open question, but is assumed as a well settled axiom, and a point perfectly and entirely at rest.

It is stated on the one side, and admitted on the other, that the right of the consignee to insure the goods he holds for sale on commission, is indisputable; and the only question was, whether the persons insuring in those cases, came within the description of consignees, and had made the insurances in question in that character; and the reasons given for the rule show it to be based


on foundations too solid to be easily shaken. The consignee is viewed in the light of a substitute for the consignor, invested with his rights and clothed with his powers; the absolute and unqualified owner in possession as against all others, except the consignor, and, whose title is defeasible by that power alone from whence it emanates.

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A title, possessing so many of the properties of absolute ownership, must surely confer as high an interest as that which is vested in a trustee. The distinction attempted to be drawn between them, in favour of the trustee, to the prejudice of the factor, is purely technical. The trustee, it is said, has the legal title, the consignee has not. But that distinction, if important, is too broadly stated. The consignee has the full and exclusive possession of the property; and as long as the relation of factor subsists, is entitled to retain that possession against all the world. Most generally, he holds a bill of lading of the goods, vesting the legal title to the property itself, in him, or some acknowledgment of him by the consignor as absolute or qualified owner. *Prima facie*, then, he is, when clothed with any such document, the legal owner, and perhaps it would not be too bold a proposition to predicate of him, that the act of consignment, accompanied with full and exclusive possession, and the absolute power of sale, of themselves constitute him a trustee for the proprietor, and vest in him the legal ownership, for all the purposes of his trust, with the powers necessary for the preservation of the property as well as the performance of the trust upon which it is held. Certainly such a connection with the property approaches very near, if it does not come fully up to, the character of a trust. The consignee has an interest in the safety and preservation of the goods, consigned to him for sale, which the destruction or deterioration of them by fire would effect. He is bound also, to consult the interest of his principal in the management and care, as well as the sale of the goods, and insurance against loss and damage by fire, during the time the property continues in the warehouse for sale, as a measure of precaution, for the safety of the goods, and the security of the proprietors, must surely be within the compass of the powers of him, to whom the possession of the goods is entrusted for those

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purposes. It is for the benefit of the consignor that the goods should be kept under insurance ; and the general rule is, that the factor has a right to exercise his discretion for the benefit of the consignor.

Paley observes, that one of the most important duties which the safety of merchandise requires of factors and consignees, who act as factors and consignees, is that of protecting it by insurance. It may be said that the factor is not *bound* to insure. But the question is not upon the obligation of the factor, but upon his right ; and how far he has such a special property in the goods and interest in their safety, as to give him an insurable interest in them, in his own name, to the extent of their value.

It is not denied that a factor has a special property in the goods held by him on consignment for sale, and may maintain trover for them, if wrongfully withheld from him. And that species of ownership is vested in him, I apprehend, by the consignment itself, notwithstanding that there should not be any bill of lading, or other formal transfer in writing to vest the legal title in him. And it would be strange, that an interest, which authorises an action for the goods as his own, should not be capable of being insured, or that the duty of guarding the property from danger, should not give the corresponding right to insure it.

But again. It does not always require, either the legal title, or beneficial interest in the property, to entitle a party otherwise connected with it, to effect a valid insurance upon it. A carrier may insure the goods he contracts to convey ; yet he has neither the legal title, nor the beneficial interest in them, but he is responsible for their loss. His insurance is upon the goods ; yet his indemnity is against the consequences of his implied guaranty for their safe carriage, and not against the loss or deterioration of the property by the perils insured against. So in the case of *Oliver v. Green*, [*3 Mass. R. 133.*] a part owner of a ship chartered the residue of her, with an agreement to pay a specific sum if she should be lost, and insured the whole ship as his own property, without stating the nature of his interest ; and he recovered for the whole value of her, notwithstanding that the objection of short interest was taken. And in the case of *Bartlett & Goodwin v.*

Walter, [13 *Mass. R.* 267.] the charterer of a vessel who agreed to insure her, was held to have an insurable interest ; and he recovered the actual value, on a count averring interest in himself.

These may be said not to be apposite examples, as the charterer is deemed the owner of the ship for the voyage. But his title, at best, is but temporary, and terminates with the voyage. He has the use of the ship for the time the charter party has to run ; but he has not the right of property. The legal ownership continues in him who lets her to hire, and the insurable interest of the charterer, in the cases I cited, consisted in his exposure to damage from his engagement to protect the owner from loss, against the consequences of which engagement, he insures for his indemnity. So, again, a creditor may insure the life of his debtor, because his debt would be put in greater jeopardy by the death of the debtor. And it has been held, that a creditor may insure the goods of his debtor, destined for the payment of his debt, though consigned to another person. Yet these insurances are, in effect, for the use of the debtor and enure to his benefit. And that objection was urged against the insurance effected by a creditor, to whom the bill of lading had been assigned ; but it was held to be untenable.

But it is objected, that a policy against loss by fire, differs from an insurance against maritime risks in this, that the assured, in an insurance against loss by fire, must have the absolute or beneficial interest in the property insured, and that a mere insurable interest, in the mercantile sense of the term, is not sufficient. And the reason is said to be, that the policy against loss by fire, is a personal contract with the assured, to indemnify him for his loss, and not a contract to protect the property, for the benefit of the owners and parties in interest. So far as this distinction turns upon the difference in the usual forms of the two classes of policies, it may be well founded. For the marine policy is most commonly general in its terms, comprehending in its indemnity all who are interested in the subject of insurance ; while the fire policy limits its protection to those who are specially named in it. But in any other sense the distinction is without solidity ; for they are both personal contracts and contracts of indemnity to the assured solely.

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Neither of them protects the property at large, for the general benefit of the owners. It is the difference in the terms of the different contracts, that creates the difference in the nature and extent of the insurance : and I am not prepared to say, that the policy against the risk of fire, is not capable of as much latitude, as the policy against maritime risks.

Usually, and from prudential considerations, the companies who insure against fire, require the names of the assured, to be inserted in the policies, and restrict the insurance to the persons so named, and stipulate against a transfer of the policy without the consent of the insurers. So may the insurers against maritime risks : and upon such restricted policies the interest must be averred and shown to be in the persons insured in the policy, as strictly as in a policy against loss by fire. Thus in the case of *Barker v. Marine Ins. Co.* [2 *Mason's Rep.* 369.] cited by the defendants ; where an insurance was effected on goods which had been abandoned to the insurers and accepted by them, but the goods had been purchased in by the master himself, for the original owners, at a sale of them in the port of necessity and the policy was for account of the master, the original owner, or both of them : the sale to the master being held to confer no title upon him, the policy was adjudged to be inoperative, because the property, being vested in the insurers by the abandonment and the acceptance of it, prior to the insurance, the persons named in the policy had no insurable interest, upon which it could attach. So in the case of *Graves & Barnewall v. The Boston Marine Ins. Co.*, [2 *Cranch's R.* 419.] a policy on a cargo in which Graves & Barnewall were jointly interested, was held to cover the interest of Graves only, and not to insure that of his co-partner, because the name of Graves alone was inserted, and the insurance was in its terms for him only, and not for whomsoever it might concern.

It is for the same reason that the insurance against fire is restricted to the assured specially named in the policy. But the indemnity to the assured will embrace his entire interest in the subject insured ; and I know of no principle, or adjudged case, which prescribes a narrower rule of insurable interest of a policy

against fire, than for a policy against the perils of the sea. The subject of insurance may be such as not to admit of any other insurable interest, than the beneficial ownership; whatever interest the assured might insure against maritime risks, he may insure against fire. And, indeed, the marine policies usually, if not universally, comprehend an indemnity against loss or damage by fire, during the voyage or term for which the insurance is effected; and the only difference between a marine policy, which enumerates loss by fire as one of the risks insured against, and a fire policy insuring against loss or damage by fire, is that the one protects the property from loss by fire on board of a ship, and the other from fire in a warehouse. The policy in each case, in its principle, without any special agreement engrafted upon it, is a contract of indemnity, and the assured must show an insurable interest, and a loss to himself, to entitle him to recover.

If, then, these plaintiffs had an insurable interest in the goods they held on commission, this policy covered that interest. The case of *Lynch v. Dalzell*, [2 *Mar. on In.* 801. reported in 3 *Br. Parl. Ca.* 49.] does not militate against this construction of the policy. In that case, one Ireland, the lessee of a tenement, obtained a policy from the Sun Fire Office, in the usual form, for the insurance of his house, with his goods therein, from loss and damage by fire. The assured died, and the policy was continued by his son, an executor, in the usual form up to Christmas, 1727. In August of that year, the house was destroyed by fire, and the loss was claimed by the plaintiffs, as purchasers of the house, and assignees of the policy. No assent had been given by the assurers to the assignment; and it appeared, that the policy, by the terms of the contract, was not assignable without leave; and it further appeared, that the purchase of the claimant was anterior to the fire; but that the agreement for the assignment of the policy, was not made till after the agreement for the purchase of the term in the house, and that the assignment of it, though bearing date before, was not made till some time after the fire. And it was held, that these policies are not insurances of the specific things mentioned to be insured, and do

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not attach on the realty, or go with the same, as incident thereto, but are special agreements with the persons insured, against such loss or damage as they may sustain, and that the party insured must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction. And the points upon which the decision turned were, first, that the policy to Ireland, the assured, limited the satisfaction, in case of loss, to such loss as should be sustained by Ireland alone, which right had been transferred to his executor; second, that there was no assent of the office to the assignment of the policy to the plaintiff; and third, that the assignment had not been agreed for, till the insured had determined his interest in the policy, by parting with the property, and had not been executed, till after the loss had actually happened. That decision, therefore, has no application; nor do the properties, ascribed by the court in that case, to policies against the risk of fire, materially vary from the principles of a marine insurance. The latter is, equally with the former, a personal contract with the assured, and the interest it protects, must equally continue to the time of the loss. Neither of them is in its own nature assignable; but the interest of the assured in each, where the terms of the contracts are the same, is equally transferrable by one to another. And the difference, in this respect, which usually prevails between them, results from the terms of the contents, variances in the terms of the policies, and from the stipulations in the policy against fire, and not from the diversity of the contracts in their principles.

But it was urged against the insurable interest of a consignee, that a supercargo, who has charge of the cargo for sale, is held to have no right to insure: and if maritime risks are intended, the reason is obvious. The supercargo, as such, has no possession of the goods, or power over them, during the voyage. His trust is, to sell in the foreign market, and his duty commences on the arrival of the ship. The right, or power to insure, is not within the scope of his authority, and does not result from any necessity. He may indeed be vested with special powers, and he would in such cases acquire the correspondent right. But



suppose the goods to be landed, and the instructions of the supercargo, to require, or authorise him, in given events, or at his discretion, to wait for a market ; and in the exercise of those powers, it became necessary to warehouse the goods ; would not the right to insure them against fire, if deemed advisable, result, by necessary implication, from the power to retain the goods in store, and the consequent hazard to which they may be exposed ? Unless the power to insure, should be held to vest in him, the goods must remain, until the sale of them, at the risk of the owner, and that power must, therefore, in such an emergency, of necessity result to him.

But again. Suppose the goods to be consigned to the supercargo, and the bills of lading to be delivered him, could a serious question be made of his right to insure against fire, or even against maritime risks ? In the case of *Buck & Hedrick v. The Chesapeake Ins. Co.* [1 *Peters' S. C. Rep.* 151.] the master, to whom the goods were consigned, was held to have an insurable interest in them. It is said, the point of this case was, that the goods were vested in him, and that they were documented as his. Let it be conceded, that such was the ground of the decision : the supercargo still had no beneficial interest in the cargo, but was, essentially, a mere consignee clothed by the consignment, with the power to sell the goods, for the account and risk of the consignor. And if the fact of the consignment confers the right, may not every consignee of goods, for sale, claim the same title, by virtue of his consignment ? The consignment is, most generally, accompanied by the delivery of the bills of lading to the consignee ; and where no bill of lading accompanies the goods, the delivery of them, with written or verbal authority to sell, must be tantamount. In each case, the consignee is virtually a trustee for the sale of the goods, and has, to all substantial purposes, the same special property in them, that vested in the master, by the consignment, in the case of *Buck v. The Chesapeake Ins. Company*.

That case must be admitted to establish the principle, that a consignee, who holds the bill of lading and invoices of the goods,

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in his own name, has an insurable interest in them. And yet he has no higher title to the goods than other consignees ; for his powers are revocable, and his interest defeasible, by the principal, at pleasure ; and other consignees have a title equally secure, and an interest equally absolute, as against all the world, except the consignor ; and their special property can be divested by no other person. The sole difference is, that the one is possessed of written evidence of his title ; the other may hold under a verbal transfer.



The fair result of these authorities, and the just consequence of the special property of the factor, in the goods held by him for sale on commission, is, that he has an insurable interest in them, to the full extent of their value, and may insure them in his own name, and recover the amount payable for the loss, on an averment of interest in himself. As between the factor who effects the insurance and recovers for the loss, and the consignor to whom the goods belong, a trust may result from the operation, and the consignee be held accountable to the principal for the avails of the insurance he effects, on the principles which would have applied to the proceeds of the sale, however exclusive the contract of insurance in its terms may be, in favour of the factor, as absolute owner. But this is an accountability with which the underwriter has no concern. The test of his liability is the insurable interest of the assured. And the rule of interest, which I incline to apply to the factor, while it violates no principle of law, essentially subserves the purposes of commerce, and the general interest of the community, without trenching upon the rights of the insurers, or involving them in any extra-hazardous risk. The operations of the commission merchant, necessarily require, that he should have the goods of those who employ him, in the same warehouses, and so commingled, as to form one common stock, ostensibly, of the same ownership, and exposed to the same risks, and partaking of the superintendence, safeguard and care of the same agents. The consignee, or commission merchant, has the possession, management and disposition of the whole. Purchasers derive their title solely from him ; he has the power to sell the goods to his own creditor, in satisfaction of his own

debt ; and trespassers and wrongdoers who interfere with the property are amenable to him for the consequences. He is, in effect, the trustee, as well for the charge and management of the consignment, as for the sale of the goods, and the receipt of the price, and his principals are the beneficial owners, to whom he is accountable for the net proceeds ; and he must, for the judicious exercise of his trust, have the power to protect the goods, while unsold, by insurance. Why, then, should he be required to sever his insurance upon the property, or to open distinct policies upon the goods of each consignor, or to specify therein, several consignments ? No one valuable purpose is to be answered by the separation ; for the risk on each is the same, and the whole is under the direction of the same agency. The convenience of all parties is consulted by covering the whole with one insurance, in the name of the consignee who has the actual possession and charge of the whole, and the same special property in all.

But again : the nature of the factor's employment, renders an insurance by him in any other form, not only inconvenient, but impracticable ; or extremely difficult in practice. He holds himself out to the world as a commission merchant, and solicits the consignment of all who may have goods for sale. The purpose of the consignments is the sale of the goods, and the merchandise of different employers, passes in succession under his operations and agency. The goods of A., which occupy a place in his warehouse, at the present moment, may be sold before the close of the day, and the goods of B. take their place to-morrow ; and in the course of thirty days, as many different lots of merchandise may have had the shelter of his warehouse, and been exposed for different periods of time, to the risk of loss or damage by fire therein.

How is these factor to protect these different interests by insurance ? If he is bound to specify each, he must either open a separate policy on each, or cause a specification of each to be endorsed on a general policy covering the goods of whomsoever it may concern : either of which methods would be attended, in an extensive establishment, with insuperable difficulties, and neither of them fully accomplish the object.

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These considerations may have led to the form of insurance now in use, by a general policy, like the present, in the name of the commission merchant, on all goods that may be in his warehouse, at any time within a given period, to a specified amount, whether held by him as owner, or in trust, or on commission. Such a contract meets the exigencies of the case; for under it the insurers will be answerable for loss or damage by fire, within the terms of the insurance, to whatever merchandise or property may happen to be in the warehouse at the time of the fire, and be then held by the assured, as general or special owner, without regard to the time of his receipt of the goods in store, or the persons who may be interested in them.

The policy effected by the insured in this case, was manifestly intended for such a contract, to which it seems to us, fitly adapted. It insures the plaintiffs for one year upon all goods, wares and merchandise, in the warehouse which it describes, which shall belong to them, or be held by them in trust, or on commission, to the amount of \$10,000: and it is admitted, that the insurable interest of the assured in their own goods, and the goods of their principals, which were in the warehouse at the time of the fire, was covered by the policy. And if the plaintiffs, as consignees, had an insurable interest in the goods held by them on commission, to the extent of the value of the consignments, they were undeniably protected by the policy, and a more particular specification of the interest of the consignees, if otherwise necessary, was dispensed with by the parties to the contract.

But it is asked, with apparent confidence, why, if the consignee of goods, with a general power of sale, has authority as such, to effect insurance, orders to insure are ever given by the consignor? or why is it, that express or implied instructions to insure, must be shown, to charge the factor with loss, in case of his neglect to effect insurance?

The defendants themselves have given an answer to the objection. They predicate of the factor, that he is not bound to insure; and the authority of Chitty is adduced in support of the position. Paley agrees with Chitty; and such seems to be the

settled rule. The factor has an insurable interest, which gives him the right, but does not impose upon him the obligation, to keep the property under insurance. He is to exercise his own judgment, and to insure or not, according to his discretion. He may be dissatisfied with the terms of insurance. He may have stored the goods, in a fire-proof store of such location, as to be, in his judgment, sufficiently secure from fire; or he may have contracted for the sale of them, and be about to deliver them to the purchaser. In all these cases, the extreme caution of some factors, may still induce them to insure; while the confidence of others, may lead them to trust the goods without insurance. And both classes, if they act in good faith, will be saved harmless; the one being entitled to the reimbursement of the premium, the other exempted from the loss. The consignor, if he desires his property to be insured, at all events, and is not willing to trust to the judgment of his factor on the expediency of the insurance, must give an express order; or must be entitled from the special circumstances, to have the property insured by the factor, or he cannot look to him for the consequences of neglecting to insure it.

But there is another answer to the objection equally conclusive. The orders to insure, to which the books refer, are orders for insurance against marine risks, usually the risks attending the transportation of the goods from the place of shipment, commonly the residence of the consignor, and the place of destination, generally the residence of the consignee. It is to that species of insurance, that Phillips refers, [*chap. xxii. p. 519.*] when, adverting to the principle that a consignee of goods has authority to insure them, so distinctly advanced in the case of *Lucena v. Craufurd*, he subjoins the comment, that this will depend upon the particular circumstances, for that it can hardly be supposed, that the mere fact of consigning goods to a foreign merchant, without any orders as to insurance, would of itself be a sufficient authority upon which to effect insurance, and charge the consignor with the premium. Without yielding to the justice of the comment, or examining how far the reason he opposes to the generality of the rule may require its restriction to cases

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specially circumstanced, I observe that there is a wide difference between the insurance of goods against maritime risks on the voyage of exportation, and the protection of them by insurance while in store, against fire. In the first place, the consignee has not the full possession of them, and is not invested with all his powers over them, until the arrival and delivery of them to him. But without laying stress upon that circumstance, I observe, in the next place, that the great reason why the consignee for sale does not insure, and is not expected to insure against maritime risks on the voyage of importation without an order for the purpose, is, that the consignor, in such cases effects the insurance himself, and he does so, for the most cogent reasons. He is on the spot, capable of determining for himself whether he will insure or not; and if he prefers insuring, can select his own underwriter, and be sure of having the property satisfactorily covered. If he trusts to his foreign correspondent he may be disappointed; his orders may miscarry, or not arrive in season, or his consignee may fail, and besides, in case of loss, the insurance if made by him at home will be the more readily and more easily realized, and with greater advantage to himself, than if to be collected by agents abroad, and remitted by them to him. He therefore will seldom trust a concern so interesting in its consequences to his factor abroad, when he can attend to it himself at home. And hence it is, that orders to insure are not usually given to consignees, unless they are required to make advances on the goods in anticipation, and the insurance is to be for their own protection and security. The consignee, therefore, would not, ordinarily, insure against the maritime risk of the voyage, without the orders of the consignor, or some reason to induce the act. But if he should, upon the receipt of the bills of lading, effect insurance *bona fide*, and for just cause, upon the goods consigned to him, for the voyage of importation, I am not prepared to say, that the contract would be void, or that the charge of the premium could be rejected by the consignor. But the objection to a maritime insurance, on the goods, on the voyage, does not apply to the insurance against fire, during their continuance in the warehouse of the factor, waiting for buyers. That insurance

devolves immediately, and almost of necessity, upon the factor. He has the exclusive possession and charge of the goods. He is interested in the safety and profitable sale of them; has the means of reimbursing himself the premium, and possesses all the knowledge of the place of deposit, which is required to effect a valid insurance upon them. But the consignor, from his distance, and his want of local knowledge, will be unable to judge of the necessity of insurance, or the nature of the risk, or to describe the building, in which the goods may be stored, with sufficient certainty for a binding contract.

These considerations satisfy me, that in principle the consignee, who has the actual possession of the property, with plenary powers of sale, must be clothed with a special property in the goods, so as to enable him to effect a valid insurance upon them in his own name, and to entitle him to recover for the loss of them, upon an averment of interest in himself. I have found no adjudged case necessarily impugning that conclusion; and the current of judicial opinion is in favour of the principle. But again; if it should be conceded, that the consignee has not the right to insure the goods of his principal under other circumstances, or against other risks, he must, I think, from necessity, be vested with the power to insure against loss or damage by fire, in his own warehouse, for the safety of the goods while they remain in his hands for want of buyers. And if his special property does not (though I think it does) give him the right to insure, as upon an insurable interest in himself, beyond his own beneficial interest, or subsisting liens, he must still have the special power at his discretion, and without any specific instructions to effect insurance on the surplus interest for the benefit of his consignor. And in this point of view, the usage found by the jury might have an important bearing upon the rights of the parties. For, if such insurances are sanctioned by usage, those who send their goods to a market where the custom prevails, must be presumed to know its custom, and to act upon the knowledge of it, in regulating their consignments. And these defendants, who knew the plaintiffs as commission merchants, and were apprised by the declaration of the policy, that the insurance was

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to be upon goods held on commission, must be taken to have entered into the contract with reference to the usage, and must abide by its influence on their liability. The general prevalence of such a custom might account for the absence of orders to insure: the consignees choosing to trust to the judgment and discretion of the factors residing on the spot, and possessing a full view of the whole ground, as to the expediency of insurance against fire, rather than to bind them down by express orders to the duty of insuring at all events. It would be difficult to account for the indifference and inattention of the consignor's interests, which the neglect to give the orders would otherwise manifest, upon any other supposition than that of a settled conviction on their part, resulting from past experience, or the advice of counsel, of the right of the consignee to insure, and a confidence in the judicious exercise by them of the power, or that of a reliance upon the conformity of the consignee to an established usage for the factor to keep the goods sent to him for sale, under insurance, until sold.

But it is contended, that such an insurance would be for the indemnity of the owner of the goods; and to be sustainable as an insurance for his benefit, and on an implied authority from him; the policy must be in his own name, or the terms of it must be sufficiently comprehensive to embrace him, and cover his interest; and that the loss, moreover, which may happen, must be recovered on an averment of interest in him. These may be requisites of an insurance effected by an agent, insuring by the order, and on the account of his principal solely, or by a naked consignee, who has the possession merely without the power to dispose of the subject he insures; and they are rules which apply also to policies expressly declared to be for the benefit of the principal, and not professing to be upon any interest of the agent or factor, who effects them. But can they be applicable to this contract? It surely could not be necessary to the validity of this insurance, that these factors should insert the names of their principals in the policy. Such a requisition could subserve no valuable purpose, and would be embarrassing in the extreme, and often times impracticable. An insurance, like the present, is for the protection and indemnity of the commission merchant.



against loss or damage to any goods or merchandise, that may chance to be in his warehouse, at the time of the fire, and may then belong to him, or be held by him for sale on commission, as the factor of others. And it cannot be foreknown whose goods will be there at that time. The insurers, therefore, admitting them to be entitled to notice of the names of individuals intended to be benefited by the policy in ordinary cases, have dispensed with it in this case, by becoming parties to a contract which necessarily precludes the disclosure. But there was no difficulty in stating the insurance to be for the benefit of whomsoever it might concern. If the contract could be viewed simply in the light of an insurance for the use of the plaintiffs and others, for whom they acted as agents, some general expression might be requisite to extend its protection to the assured, who were not specifically named in the policy. But this is an insurance by factors, upon goods held by them on consignment for sale; and even if the law did require, as a general rule, that such insurances should be for the account of the principals, and that to render the contract available to them, the factor must adapt his policy to the form prescribed for other agents, this contract appears to me to dispense with that condition; or, rather, to require a substitute for it, which probably was supposed to be of greater value to the insurer. By the third article of the conditions subjoined to the policy, and made part of it, goods held in trust, or on commission, are to be declared and insured as such, otherwise the policy will not cover such property. Can the sense of this provision be misunderstood? Does it not import, that if the condition be complied with, by the disclosure to the insurers, that goods held on commission are to be the subject of the insurance applied for, the property shall be covered by the policy? And if such be the true construction of the clause, it amounts to an agreement, that all the goods in which the assured should be found to have either an absolute interest as owners, or a qualified property as factors, should be covered by the policy, and the satisfaction, in case of loss, be made to the assured, as representing the entire interest in them.

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It was certainly competent to the parties to enter into such an arrangement, and the contract would not be objectionable, as a wager or gambling policy; for goods equal in value to the amount claimed for the loss must be at risk, and no more would be recoverable than the actual loss or damage which those goods might sustain by fire. And the assured, if vested with a special property in the goods, would, on the principles applicable to trustees and agents receiving money for the use of the principal, be accountable for the surplus of the avails beyond their own reimbursement, to those whose interest they represent. Taking this article of the conditions, then, in connection with the description of the goods in the body of the policy, as being held on commission, and understanding the contract, with that feature in it, as I do, there could be no necessity for superadding any general words, to embrace the interest intended to be protected by the insurance. The defendants, according to the terms of the contract, insured the plaintiffs against loss or damage by fire, to the amount of \$10,000 on goods and merchandise, as well the property of the assured, as held by them in trust, or on commission, in a specified warehouse, and promised and agreed to make good to them all such loss or damage, not to exceed the sum insured, as should happen to the property thus designated, during the continuance of the risk. The insurance was for the plaintiffs, on property held by them on commission, which might be in their store at the time of the loss; and the promise is to make good to them all such loss or damage, as should happen by fire to that property. It was the loss or damage to the goods under consignment, by fire, that was to be made good; and that loss or damage was to be estimated according to the true and actual value of the property, at the time the loss should happen. Would the reimbursement of the advances of the consignee, and the payment of the commission he would have earned by the sale of the goods, satisfy the terms of such an agreement? It surely would not be making good to the assured the loss to the property by the fire. If the insurance upon the goods held on commission had been intended to be confined to the advances and commissions of the factors, who effected it, other terms would most

probably have been used to describe the interest. It would have better comported with the character of such a contract to have declared it to be an insurance on the advances and commissions of the consignees, or their own property in the goods, and the promise would have been to pay the loss or damage to the extent of that interest. The terms employed by the parties to this policy more aptly embrace the entire property in the goods, as the subject of the insurance, than the partial interest to which the limited construction now sought to be put upon the contract would restrict them. But again; if the intention was to effect a partial insurance on the goods held by the assured on commission, and to cover the advances and commissions only of the consignees, and the policy in its usual form, without any special clause or declaration, was supposed to have that operation, to what end were the declaration and disclosure required, which the third article of the conditions calls for? The requisition is said to be intended for the benefit of the underwriters, and was of such importance to them, that its observance was made the condition on which the policy was to attach. What purpose, then, was it to subserve? It could not be designed to limit the risk to an interest to which they understood the policy itself, by its own character, to restrict it; and it could be of no use to them in making the estimate of the rate of premium. For upon the construction the defendants contend for, the consignee alone would be insured, and his insurable interest would be precisely the same, whether his policy was upon goods generally, or upon goods declared, and insured, as goods held by him on commission; and the declaration, of course, could have no influence on the rate of the premium. The mere commission on the sale was too small a risk to create a solicitude on the part of the underwriter as to the vigilance of the factor in the safeguard of the goods; and if his advances were to a sufficient amount to interest him in their preservation on his own account, the insurers would have the same pledge for his special care and attention that his absolute ownership would give him. Are we not justified in the conclusion then, that these parties, if they did understand a general policy for a factor not to embrace the entire value of the goods

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held by him on commission, must have intended by the specification introduced into this policy to extend its protection to that interest. It was desirable to the plaintiffs to keep the goods of their principals in their warehouse under insurance, and the defendant could have no reasonable objection to the risk.

In framing the contract on that principle, the leading object would be to select some apt and comprehensive form of description to designate the interest intended to be covered, and to limit the risk to property of that description. And these features appear in this contract. It is a policy prepared in reference to that class of risks, and has an article in the conditions which accompany it contemplating the insurance of goods held on commission, and requiring them to be declared and insured as such; and the contract conforms to the condition, being in terms an insurance upon goods and merchandise, as well the property of the assured, as held by them in trust or on commission. These terms of insurance, especially when taken in connexion with the explanatory condition, may surely be held to import an agreement, that the goods held by the assured on consignment for sale, might be the subject of insurance, and that the entire value of them, when declared and insured as such, should be covered by the policy; and the assured be entitled, in case of loss, to the same measure of satisfaction, as if they were his own absolute property. And if that conclusion be correct, these plaintiffs would, on that ground, even if other grounds should fail them, be entitled to recover.

But I view this feature of the policy in a light yet more favourable to the assured's claim. I regard it as an implied admission, by the defendants, of an insurable interest of factors in the goods they hold on commission; and that a policy by the plaintiffs, in their own names, on goods generally, would attach upon the consignments in their hands for sale, and cover the entire interest in them. Hence the declaration in question was supposed to be necessary, and was required and made a condition of the insurance; not for the purpose of limiting the operation of the policy, but for the purpose of possessing the insurers of facts deemed material to a judicious estimate of the risk; and the cir-


cumstance, that the consignee is coupled in the condition with the trustee, tends to confirm this exposition of the policy. A trustee is acknowledged to have an insurable interest in the trust property; his declaration and insurance of the goods, as trust property, could neither invest him with any new interest in it, nor divest him of that which he had before. And the disclosure of the trust called for by the condition must have been required, on account of its supposed bearing upon the application for insurance, or the rate of premium. And when the consignee is placed on the same footing with the trustee, and the same declaration and disclosure of the nature of his ownership is required of him, it seems to follow, that his special property in the goods he holds on commission, must have been understood to be equally an insurable interest with that of the property of the trustee in goods held by him in trust, and that the information required of each was for the same purpose. The object of the requisition could not be the discovery of the consignees of the goods, as their names were not required to be disclosed, and as the disclosure was unimportant. The declaration and insurance by the trustee or the factor of the goods, he holds as goods held in trust or on commission, must have been required on the ground, that the legal title of the trustee and the special property of the factor, though conferring upon each an insurable interest to the value of the goods, yet did not authorize a calculation upon that active zeal and watchful vigilance in the safeguard of the goods, which an absolute ownership would probably ensure; and that a higher rate of premium would be required for insuring goods for the special, than for the general owner. But the insurers, it is said, look to the character of the assured for integrity and prudence, and not his interest in the subject, as the ingredient in the risk. And it is suggested, that the object of the underwriters, in restricting the indemnity to those who are named in the policy, was to compel a disclosure of the persons whose interests were to be covered by the insurance, so as to enable them to judge of a risk, into which the character of the assured for integrity and for discretion and vigilance, so materially enters; and the inference is said to be, that these defendants can-

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not be presumed, in the face of this settled and uniform rule and course of proceeding, to have agreed to extend this policy beyond the interest of the plaintiffs themselves, to property belonging to other persons not named in the contract. But this contract does not, in terms, restrict the insurance to the assured specially named in the policy ; and the information called for by the third article of the conditions, as we understand the agreement of the parties dispenses with that disclosure. That article simply requires, that goods held in trust or on commission should be declared and insured as such. The names of the *cestuy que trust*, or of the consignors, are not required to be disclosed ; and we see in the example before us, that a simple declaration and insurance of merchandize, as goods held in trust and on commission, without the disclosure of the parties beneficially interested, were admitted to be sufficient to satisfy the condition, and give validity to the insurance. That the moral character of the assured, who may have powerful temptations to benefit himself by the fraudulent loss of the property, and his habits of care and vigilance, or of inattention and negligence, enter materially into the risk, cannot be denied : and it was upon this consideration principally, it is true, that the regulation was introduced, which restricts the insurance to the assured named in the policy and forbids the transfer of it to others. These reasons, however, refer to insurances on property in the immediate possession and charge of the assured, or to which they have free access. No such motives could actuate the insurer in estimating the risk he takes when he insures the goods of the consignor in the possession, and under the exclusive control, of the consignee. The disclosure of the fact of these goods being held by the assured on commission was notice to these defendants, that the goods were not to be in the charge or custody, or under the care of the owner of them, but of his agent and factor, during the continuance of the risk : and the defendants would look, therefore, to the character of factor, and not to that of the owner, for integrity, discretion and vigilance, and the claim he has on that ground to a disclosure of the names of the assured, was fully satisfied, by giving him the names of the factors.

Upon the whole, the result of my reflections upon the case, in all its aspects, is in favour of the plaintiffs' right to recover the loss and damage to the goods he held on consignment for sale, upon the entire value of the goods, and that judgment must accordingly be entered upon the verdict.

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OAKLEY, J., after stating the facts of the case.

The first question, which presents itself, is, whether the Judge properly admitted the evidence, as to the alleged usage of commission merchants, in the insurance of the property of their consignors. The counsel of the defendants, on the argument, did not discuss this point ; and, indeed, there seems to be no ground, on which the propriety of the admission of that evidence can be questioned. To ascertain the rights of the consignees, as to the insurance of the goods in question, it was clearly competent for them to show the course of trade in which they had been engaged, and that the insurance of the property in their hands, was a part of their regular and customary business as factors, although no express orders to that effect were given by the consignors. The defendants were bound to know this usage, and must be understood to contract in relation to it. [*Phil. on Ins.* 16, 17.] But it is not necessary to consider this point more particularly ; as in the view I have taken of the case, the usage found by the jury has no material bearing on its merits.

The important question to be decided, is, whether the plaintiffs can recover on these policies, beyond the value of their own property, and the amount of their advances and liens upon the property held by them on commission. Their right of recovery to that extent is conceded by the defendants.

A policy of insurance, like all other written contracts, is to be construed, according to the plain, ordinary and popular sense of the terms used in it ; unless, by the usage of trade, such terms have acquired a peculiar sense or meaning. [*Robertson v. French*, 4 East, 135.] Considering the policies in this case, according to this rule, it seems to be clear, that the parties intended that they should cover the goods held by the plaintiffs on commission, to the same extent, as those which were their absolute property. The

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language of the instrument is sufficiently explicit : The defendants agree to insure " goods, as well the property of the assured, as those held by them on commission." Nothing is said, in terms, of the *interest* of the plaintiffs, in goods held by them on commission. Although the plaintiffs, in compliance with the third condition annexed to the policies, apprized the defendants, that they wished insurance upon other goods than those in which they had the absolute property, the defendants did not think proper to limit or qualify the terms of the contract. Indeed, it is fairly to be inferred, from the terms of that condition, that the defendants understood, that insurance on goods generally, as the property of the assured, would, independently of the condition, cover goods held in trust, or on commission. And what seems to remove all doubt, as to the actual intent of the parties, is the rule, by which the amount of damage, to the property, insured, is to be estimated. It is, by the express terms of the policies, to be "*according to the true and actual value*" of the property at the time the loss may happen. This rule is applied alike to all the kinds of property enumerated in the policies. As to goods, the absolute property of the assured, no other rule could have been adopted. And the application of that rule, to goods held on commission, marks, very clearly, the understanding of the parties, that no distinction was to be made, as to the *character of the interest* of the plaintiffs in the different kinds of property insured. The whole tenor of the policies shows, that all goods covered by them were considered, to the same extent, and for all the purposes of the insurance, as the property of the assured.

Such being the contract actually made between the parties, the question arises, whether a factor or commission merchant, having property consigned to him for sale, and in his actual possession, has any general interest in it, which will enable him to make a valid contract of insurance in his own name ; covering the whole value of the property without regard to the extent of his lien. This is a question of very great importance to the commerce of this city. The practice of insurance against fire, on the property of the foreign merchant, in the hands of his consignee, greatly tends to promote the interests of trade : and it ought to be upheld by any means not inconsistent with es-



established rules of law. The well known and usual mode, among commission merchants, of covering the property of their principals, is by a general insurance upon time, like that in the case now before us. A policy, thus made, cannot be considered as attaching specifically and solely, on the goods in the hands of the factor, at the date of the policy. It is well understood by the parties to all such contracts, that the property of consignors is constantly changing, in the hands of the consignee; and that it will and must often happen, that no part of the specific goods, originally covered by the policy, is exposed to loss, when any fire may take place. Indeed, it does not appear, how insurance against fire, on property in the possession of a factor, which may be sold at any moment, can be effected on each consignment of goods, without subjecting the owner to great inconvenience. A sale of the goods insured would, at any time, put an end to the policy. Such a mode of insurance would give to the insurers an unreasonable advantage; as a premium would, almost always, be taken for a period greater than that of the risk actually incurred. And although a return of premium, in such cases, might be specially stipulated for in the policy; yet, it is apparent, that the necessity of multiplying these special stipulations, and of the frequent insurances, which must be resorted to by the factor, would greatly embarrass the course of his business. The mode in use, while it gives every facility to the commission merchant, subjects the insurer to no disadvantage. It would be a matter of much regret, if this mode, so beneficial to the general interests of trade, should be found to be unsupported by law.

The consideration of the question now before us, leads to a view of the rights and powers of a factor over property in his possession, for the general purposes of sale. These rights and powers grow out of the relations existing between him and his principal, and between him and third persons or strangers. As it relates to his principal, he has no power to deal with the property consigned to him, otherwise than according to his instructions. He has a right to retain it, or its proceeds, for payment of all commissions and charges, and for the reimbursement of all advances. As between principal and factor then, the interest

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of the latter in the property may justly be said to extend no farther than his lien. But as between the factor and third persons, his powers and rights are of a very different character. And it may be affirmed, that in all questions relating to the property in his hands, arising between him and them, he is, without the positive interference of his principal, considered by the law, as the owner. As it respects the public, he is treated as such: for if a felony be committed of the goods, the indictment may aver the property to be in him. So in case of *trover* or *trespass*, he may maintain his action as owner of the goods. 2 *Saund.* 47. *b. note.*] And in such cases the *damage* is laid in the declaration to be *his*. So, he has the absolute power of selling the goods; and may give discharges to the purchaser; although he sell to his own creditor, for the purpose of satisfying his own debt [*Cowp.* 256. 1 *Com. on Con.* 243. 3 *John. Ch. Rep.* 573. 5 *do.* 429.] And it is the constant practice upon such sales, for the factor to sue for and recover the price of the goods, in his own name. So an *auctioneer* may maintain an action in his own name for goods sold and delivered; though he sells them at the house of his employer, and the goods are known by all parties to belong to him. [*Williams v. Millington*, 1 *H. B.* 81. *Hulse v. Young*, 16 *John. R.* 2.] And it was so held, on the ground that the auctioneer *had the possession of the property, coupled with an interest*. And Lord Loughborough in *Williams v. Millington*, likens the case of an auctioneer to that of a factor, in point of principle. So, if the factor should entrust the goods to a common carrier, and they should be lost, under circumstances rendering the carrier liable; it cannot be doubted, that he might maintain an action in his own name, for the full value of the goods. In these cases, the purchaser or carrier, would never be permitted to inquire into the relations subsisting between the factor and his principal, or to limit the extent of their liability by reference to the amount or extent of the factor's lien on the goods.

It would seem to follow, from this view of the powers and rights of general factors or commission merchants, that for all purposes connected with the custody and disposition of the property, the law considers them as owners; and that they may enter into

any contract with third persons in relation to the goods in their hands, which becomes necessary or expedient in the execution of their general powers: and that they may maintain actions in their own names, for the breach of any such contract, and aver loss and damage to themselves to the value of the property.

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The contract of insurance, by a factor, against fire, seems to me to fall clearly within this general principal. It is a contract for the preservation and safe keeping of the property, until it can be sold. It is made in the regular course, and according to the custom and usage of his business; and is expedient, if not necessary, for the prudent and judicious execution of his general powers as factor.

I am unable to perceive any ground, in principle or good sense, why this contract ought not to be viewed in the same light with the contract of sale: and why the factor may not in the one case, as much as in the other, be considered as the owner of the property, for the purpose of entering into the contract, or of recovering damages for the breach of it.

The effect of a sale of goods, by a general factor, although he acts against his secret instructions is founded on the custom of merchants, and in the safety and convenience of commerce. It is equally important that such a contract of insurance, as the present, should be supported on the same grounds. I cannot find, that the conclusion I have arrived at—that a general factor, having possession of the goods, is to be considered in law, as having an insurable interest, in the whole amount, without reference to his lien, is any where opposed by authority. The counsel of the defendants, at the bar, cited no adjudged case restricting necessarily, the insurable interest of a factor, or consignee, to the extent of his lien on the property; and none has fallen under my observation.

It is laid down generally in Phillips on Insurance, [44.] that the insurable interest of a consignee, or factor, is limited to the extent of his lien. That writer gives no authority for his position; and he lays it down without any discrimination between Marine and Fire Insurance. It might be well contended, (if it were necessary) that a more liberal rule ought to be adopted, as to the extent of the insurable interest of a factor, in the case

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of insurance against fire, than in the case of a marine insurance. The convenience of trade would seem to point out and sanction a difference, in the application of the rule to the two kinds of insurance.

In several cases, the rights and interests of consignees or factors, in effecting marine insurance, have been incidentally alluded to by the courts. Thus in *Lucena v. Craufurd*, [3 Bos. & Pull. 95.] the Judges say, "It is not necessary, that the assured should have a beneficial interest in the property insured. It is sufficient if he be clothed with the character of a trustee, an agent, or consignee." And again, [p. 98.] they observe, that "many consignees receive goods, with orders to attend to the directions of the consignors as to their disposal; and yet they are not the less able to insure. So every trustee is subject to the directions either of *cestuy que trust*, or the Court of Chancery." In the same case, in the House of Lords. [5 Bos. & Pull. 289.] Lord Eldon says, "a trustee has a legal interest in the thing and may therefore insure. So, a consignee has the power of selling." In *Craufurd v. Hunter*, [8 T. R. 13.] which involved the consideration of the same policy, Lord Kenyon says, there is no doubt, that a trustee or consignee may insure: and Grose J. remarks, that if the plaintiffs in that case, were "either trustees or consignees," it seems admitted that they might insure.

It is manifest, that the judges in these cases considered a trustee and consignee as standing on the same ground, and having the same right to insure. And it is not questioned, that a trustee has an insurable interest in goods, as owner, to their full value, although he may not have a beneficial interest in them to any extent, and that insurance may be effected by him, on the ground of his own interest, and not as agent of the *cestuy que trust*.

It has been objected at the bar, that this view of the interest of a factor, or consignee, exposes the insurer to the danger of double insurance. The same remark will apply to the case of mortgagor and mortgagee, Trustee and *cestuy que trust*.

In 13 Mass. 67. it is said, "that a bona fide equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description

"of the thing insured." And again, that "several persons, having several interests, may insure to the full value of that interest."

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Although there may thus be a double insurance, on the same thing, and, as in the case of trustee and *cestuy que trust*, to its full value; yet in case of the destruction of the thing insured, there could be but one indemnity recovered. If in a subsequent policy, there be "no provision in respect to prior insurance, the amount of insurable interest for such policy will be the same as in the first: for the assured may insure again and again the same property against the same risks, if he will pay the premiums: but he can recover only one indemnity." [*Phil. on Ins.* 326. 1 *Burr.* 489.]

In the policies now before us, it is stipulated, that the assured shall notify to the company, any other insurance, which they had effected, or should effect, on the property insured. The defendants have provided, as far as they deemed it expedient, against double insurance. They were apprized that other persons, than the assured, were interested in the property insured: and they might have guarded against the acts of the consignors of the "goods held on commission," by requiring the assured to disclose the names of such consignors, from time to time, as their consignments came under the protection of the policies.

There is another view of this case, which will also result in establishing the liability of the defendants, to the full value of the "goods held on commission" by the plaintiffs. In marine policies, effected in the name of a particular person, where it is intended to cover the interest of other parties, it is usual to insert the clause "for whom it may concern." And it seems well established, that a policy containing such a clause, or *other equivalent ones*, will protect the interest of any person in the property insured, in whose behalf the assured has a right to act as agent.

Now, whatever doubt may be raised as to the extent of the insurable interest of a factor; it cannot be questioned, that as agent of his principal, he may effect insurance, for his benefit. The words "goods held on commission" in these policies, are equivalent to the clause, "for whom it may concern," usually in-

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serted in marine policies. They contain a distinct declaration to the insurers, that the assured were acting for the benefit of their consignors : and that other interests, than their own, were to be protected by the policies.

In this view of the policies, it would be necessary to consider, how far the plaintiffs could recover upon the pleadings in this case, beyond the extent of their own absolute interest ; or how far the averment of interest in themselves is supported by proof of interest in their consignors. In *Bell v. Ainsley*, [16 East, 141.] it is said, that since the statute 19 Geo. 2. c. 27. (which declared insurances without interest, by way of gaming, void,) "the constant practice has been to state in whom the interest is, and for whom the policy was made, and to make that statement according to real fact." And in that case it was held, that joint owners of property, insured for their joint use, cannot recover on account, averring the interest to be in one of them.

In *Cohen vs. Hannam*, [5 Taunt. 101.] the same rule, as to the averment of interest, was laid down.

If the present case was governed by the rule above referred to, it would follow, that upon the declaration, as it now stands, there could be no evidence admitted, of any interest in the goods insured, other than that of the plaintiffs. If the cause turned upon this view of the policies, it would be necessary to consider, how far the rule, as to the averment of interest above alluded to, has its origin in the English statute in restraint of gaming insurances. I prefer, however, that my opinion should rest on the broad ground, that the plaintiff had an insurable interest in the "goods held on commission," to their full value, without regard to their lien ; and if I am correct in this, there can be no question as to the pleadings in the case.

The result of our opinion is, that there must be judgment for the plaintiffs, for the amount of the entire loss sustained on the goods.

*Judgment for the plaintiffs.*

[D. Lord, atty. for the pliffs. W. S. Johnson, atty. for the defts.]

THE CITY OF NEW-YORK.

BENJAMIN DE FOREST and ALFRED DE FOREST

*versus*

JOHN JEWETT and SAMUEL PARSONS.

In a suit against *two* defendants, founded upon a joint cause of action against both, *one* of the defendants cannot defeat the action by pleading, in abatement, matters which are applicable to himself alone. To make a plea in abatement effectual in such a case, *all* the defendants must unite in the plea, and it cannot be interposed by one alone.

In an action of *assumpsit* against the defendants, Jewett & Parsons, for money had and received, the former appeared by his own attorney, and pleaded the general issue ; while the latter, by a separate attorney, appeared and pleaded, in abatement of the *whole* suit, the pendency of certain foreign attachments in the state of Connecticut, which had been issued against himself alone. Upon demurrer to this plea, it was *held* to be bad, the cause of action not being covered by the plea.

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THIS was an action for money had and received, by the defendants, to and for the use of the plaintiffs. The declaration contained the usual money counts, together with a count upon an *in simul computassent*.

The defendants severed in their defence ; and Jewett appearing, by his own attorney, pleaded the general issue, and gave notice of set-off. Parsons, the other defendant, appeared by a separate attorney, and pleaded in *abatement* of the suit : That on the 23d day of March, 1827, at the city of New-York, David Cromelien and David Davies made an assignment of certain goods and effects therein specified, to the defendants in trust, to be converted into cash, and distributed among certain creditors of Cromelien & Davies ; amongst whom were the plaintiffs and Charles Belden and George Belden. That the defendants accepted the trust, received the effects assigned, converted the same into money, and proceeded to distribute the funds among the creditors of Cromelien & Davies, according to the terms of the assignment. That before the commencement of this action, to wit, on the 25th day

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of June, 1827, at New-Haven, in the county of New-Haven and state of Connecticut, four several actions were commenced, by writs of foreign attachment, against the said Charles Belden and George Belden, by certain of their creditors, as absent and absconding debtors. That said writs, for the equal and joint benefit of all the attaching creditors, without any priority amongst the same, were, on the said 25th day of June, served on the said Parsons, who was then in New-Haven ; and thereby, according to the laws of the state of Connecticut, attached all the monies, goods and effects of the said Charles Belden and George Belden, which were then in the hands of Parsons, to satisfy the claims of the said attaching creditors. The plea then averred, that all the money and effects of Charles and George Belden, in the hands of Parsons, at the time of the service of the said writs, were held by him under and by virtue of the assignment from Cromelien & Davies ; and that nothing had been received by him since that time, under said assignment. That, at the time of the service of said writs, the claims of all persons under the assignment, except those of the plaintiffs and of the said Charles and George Belden, had been satisfied ; and that at said time there were, and still are, funds in the hands of the said *John Jewett*, received under said assignment, more than sufficient to pay and satisfy the claims of the plaintiffs ; and that the said Parsons is not otherwise indebted to the said plaintiffs, than by reason of the funds so received under said assignment, and so attached in the state of Connecticut. The plea then further averred, that the attaching creditors had recovered judgments in the state of Connecticut, on their several suits against the said Charles and George Belden, to a greater amount than that demanded by the present plaintiffs in their declaration ; and that executions were taken out upon said judgments, and demand made of the said Parsons, in the state of Connecticut, of the moneys, goods and effects in his hand, belonging to the said Charles and George Belden. That writs of *scire facias* were thereupon issued, by the attaching creditors, against Parsons, and duly served on him, requiring him to show cause why the amount of said judgments should



not be levied out of his proper goods and estate ; which writs of *scire facias* were issued before the commencement of this action, and are still pending and undetermined. The defendant therefore "prayed judgment of said writ and declaration, that the same might be quashed."

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To this plea the plaintiffs demurred ; and *Mr. Hugh Maxwell*, in support of the demurrer, now contended,

I. That the plea was bad in substance. That the proceedings in Connecticut, disclosed by the plea, being between *different parties*, asserting distinct rights, to which these plaintiffs were entire strangers, could interpose no bar to the present action.

II. That there was no privity between the plaintiffs and C. & G. Belden ; the rights of the parties not being connected with, nor dependent upon one another. If the creditors of the Beldens were to succeed in drawing out of the hands of Parsons, all the funds he holds in trust for *them*, it could in no way affect the rights of the present plaintiffs against the defendants in this suit, as set forth in the declaration. The plaintiffs have declared upon a *joint* promise, express or implied, made by both defendants, and must prove the promise as laid, or fail in their action, upon the trial. A recovery in Connecticut against Parsons, by the creditors of C. & G. Belden, could not be pleaded in bar of the present action ; for, a *former recovery*, to be available as a defence, must be for the same *cause of action*, and must be sustained by the *same evidence*. [3 *Wil. Rep.* 304. 1 *Chit. Plead.* 553.]

III. The *rights* upon which the actions are founded, are different. Parsons is here sued *jointly* with Jewett for a *joint debt* ; but the matters pleaded in abatement, affect Parsons only. Jewett pleads the general issue, and puts himself upon *that* defence ; while Parsons interposes a plea, which, if it can be sustained, *overreaches* the issue tendered by his co-defendant, and ousts him of *his* defence, by abating the whole suit. This cannot be done ; for the plea does not go to the cause of action set forth in the declaration. It is no defence against the claim upon Jewett ; and, as the action is brought to recover a *joint debt*, the plea, to be available, must be set up by both defendants jointly. But

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both defendants, even, could not plead *that* in abatement, which is sufficiently only for *one*; for in such case the plea would be bad as to both. [1 *Chit. Plead.* 545.] Jewett has never been called upon by the courts of Connecticut to surrender up the funds in *his* hands, and the proceedings against Parsons alone are of no avail to him. In no point of view, therefore, could this plea be maintained, unless the proceedings in Connecticut had been against both trustees, and the defence were to be set up by both jointly.

IV. But even if the plaintiffs were bound by the proceedings in Connecticut, there still could be no reason for abating the present suit; for the plea expressly admits, that there are funds in the hands of the defendants sufficient to satisfy the demands of the plaintiffs, and of the Beldens also. The present action being *joint* against both defendants, there can be no apportionment of the funds in their hands, so far as this suit is concerned; but each defendant is liable for the whole amount of the claim. Each being then constructively in the possession of funds to the full amount of the plaintiffs' demand, there could be no good ground for this plea, even if well founded in other respects.

*Mr. Staples*, for the defendant, Parsons.

This is an action brought against the defendants, as co-trustees. One of the trustees, Samuel Parsons, being accidentally in Connecticut, was served with a legal process, out of the courts of that state, according to its laws, by certain creditors of C. & G. Belden, whereby he was commanded not to surrender up any of the funds in his hands, to the *cestuy que trusts*, but to hold the same, subject to the final orders of the court issuing the process. There can be no pretence but what these proceedings were well founded, and that the courts of Connecticut had a right to issue such process. The question then arises, whether any other person interested in the fund, can call upon the trustee, until the result of the proceedings in Connecticut can be known. Can this court anticipate the result of the judgment of the tribunal now exercising its jurisdiction over the same subject matter? It may be, that Par-

sons will be compelled, by the courts of Connecticut, to surrender up the whole of the funds in his hands, belonging to Cromelien & Davies, for the benefit of the creditors of C. & G. Belden. This court cannot know judicially, nor even by presumption that such will *not* be the result of the proceedings in Connecticut; and if Parsons shall be compelled by the judgment of a court of competent jurisdiction, to surrender up all the funds in his hands, how can this tribunal call upon him again for the same fund? Can he be made twice responsible for the same trust? Until the result of the proceedings under the foreign attachment can be known, Parsons ought not to be harassed by the suit of other persons, interested in the fund, nor be placed in peril of twice answering for the same trust. The principle on which this plea is founded, has been expressly recognized by the Supreme Court of this state, in the case of *Embree v. Hanna*, [5 *John. Rep.* 193.] and it cannot be resisted by any arguments founded either in justice or correct principles of law.

Payment under a foreign attachment is a bar to another suit, though the plaintiffs in the latter are trustees, under an attachment made before the commencement of the foreign attachment suit; [*Holmes v. Remsen*, 4 *John. Ch. R.* 460. *Same case*, 20 *John. R.* 229.] and a judgment has the same effect, [*Hull v. Blake*, 13 *Mass. R.* 153.] and may be given in evidence under the general issue in assumpsit. [*Mc. Daniel v. Hughes*, 3 *East*, 367.]

In the case of *Le Chevalier v. Lynch*, [*Doug.* 170.] the court put off the case on application of the defendant, to enable him to send abroad for testimony, that a prior suit by foreign attachment had been brought against him. [*See note to 4 Cowen*, 521.]

If payment be a bar, it follows that an action *pending* is good in *abatement*. [*Embree v. Hanna, supra.*] And it is sufficient if the proceedings in Connecticut are according to the laws of that state, though not of this. [*Hull v. Blake, supra.*] If they are not, the plaintiffs should have shown that fact by replication, or it must appear from the plea itself. It does not appear from the plea, unless the court can say, that it is contrary to the laws of Connecticut to attach funds in the hands of one of two joint trustees. This

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defence should have been set up in *Connecticut*, where the suit is now pending ; for if the plaintiffs succeed there, whether according to law, or contrary to law, the defendant Parsons, must be a sufferer.

It is of no consequence that the proceedings in *Connecticut* are not between the same parties, for the question at issue, relates exclusively to the *fund*. If another tribunal has power over *that*, this court will never compel this defendant to respond twice for the same fund. Neither is it any answer to the plea, that this is a joint action for a joint debt : because that fact cannot prevent the court in *Connecticut* from exercising its jurisdiction over the funds in the hands of Parsons. He is only answerable for the money in *his* hands, and that may be entirely taken away from him by the judgment of a court having competent jurisdiction over the subject matter. Each trustee is liable for the funds, which have come into his hands, and for nothing more ; he cannot be made responsible for the acts of his co-trustee. If this be so, then Parsons ought to be permitted to set up such a defence as shall protect *him*, without any reference to Jewett, for whom he is in no way responsible.

But it is said, that the funds in the hands of *both* trustees, are sufficient to discharge the demands of *all* persons interested in the assignment, and therefore, there can be no hardship in the case. It does not follow from these premises, that *Parsons* has money enough under *his* controul to satisfy the claims of all the *cestuy que trusts*. If he had, there might be force in the remark ; but the danger is, that all the effects in his hands may be taken from him in *Connecticut*, and he still be made answerable in this action for the default of Jewett, his co-trustee. If the fund in the hands of Parsons be exhausted, there can be no just ground for making him liable to these plaintiffs, to whom he is in no way indebted, except under the assignment.

*Per curiam*. This action is brought against two defendants, founded upon a joint contract by both. The declaration counts upon a joint promise, and at the trial, this promise must be proved expressly

as laid, or the plaintiffs will be liable to be nonsuited. One of the defendants pleads the general issue ; while the other interposes a plea in abatement to *the whole suit*, founded upon matters, which are applicable merely to himself. This plea cannot be sustained ; for the cause of action being joint, against the two defendants, nothing can abate the suit, which is not pleaded by both. One of two joint defendants cannot plead any matter in abatement of a joint suit, which is applicable to himself alone ; for the plea, in such case, does not reach the whole cause of action. The plea must be sufficient to defeat the suit against both defendants ; and to accomplish that, the joint defendants must unite in the plea. Here the defendant, Parsons, pleads the service of a process of foreign attachment upon him alone in Connecticut, and sets it up by way of defence to an action against himself and Jewett, founded upon a joint promise by both. To make this defence available in any point of view, both defendants must unite therein.

The plea may be considered as defective in another particular. There is no averment, that the suit pending in Connecticut, is for the same debts, or on the same promises, which are set forth in the declaration. The plea avers, that Parsons (individually) is not indebted to the plaintiffs upon any other account than for the funds in his hands under the assignment. The promises here relied on, are the joint promises of both defendants, and may be entirely distinct from those specified in the plea.

The principle, upon which the defendant intended to rest his plea, is doubtless correct, both in its general equity and by express adjudications. Had the process of foreign attachment in Connecticut been served upon both defendants, and had they joined in the plea, their defence to the action must have been effectual. If the funds in the hands of a trustee are withdrawn from him by the authority of a court of competent jurisdiction, he never can be called upon by any other tribunal for the same money. But here the defence must fail, because the defendants have not united in the plea which is interposed. There must be judgment for the plaintiffs on the demurrer ; but the defendant

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has leave to withdraw his plea on payment of costs, and to answer over.

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*Judgment for the plaintiffs on the demurrer.*

[W. P. Hawes, *atty for the plffs.* W. S. Johnson, *atty for the deft Parsons.*  
J. W. Gerard, *atty for Jewett.*]

**NOTE.** The authorities upon the subject of pleas by several defendants may be found collected in Archbold's Pleadings, 338. 355. Chit. Plead. 447., 553. and in Steph. on Plead. 270. This last author in a note observes, "it is said, that several defendants cannot sever in *dilatory pleas*;" and for this he cites Hob. 245.

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Wrigley.DAVID ASHWORTH *et al.* versus J. M. WRIGLEY.

Where the defendant has obtained a discharge under the act "to abolish imprisonment for debt," after the commencement of the suit, the plaintiff will be permitted to discontinue without costs, though the defendant, relying upon a defence to the form of the plaintiff's action, offers to waive his discharge.

*Mr. D. Graham*, for the plaintiffs in this cause, moved for leave to discontinue without costs, the defendant having since the commencement of the suit, obtained a discharge under the insolvent act. [*Laws N. Y. vol. 5. sess. 42. p. 115.*]

The motion was opposed by *Mr. Ketcham*, for the defendant, upon the ground that the motive for discontinuing, was not founded upon the discharge, but upon the fact, that the action had been commenced in such a way, that it could not be sustained. The plaintiffs' true remedy, he said, was by an action of account; but they had brought assumpsit, for goods sold and delivered, which could not be maintained.

The defendant, relying upon the defence presented by the form of action, was ready to waive the discharge altogether, and would stipulate not to interpose it as a defence in any shape.

*Per Curiam.* The motion must prevail as a matter of course, and is always granted by the Supreme Court in like cases. The only doubt originates in the defendant's offer, to waive his discharge: but it does not appear, that he has any defence to the action, except as to its form. The court will not, therefore, drive the plaintiff to the expense of a litigation, which can never draw in question the real merits between the parties.

*Motion granted.\**

[*D. Graham, Jun, atty for the plffs. Ketcham & Fessenden, attys. for the defts.*]

\* *Vide Honeywell v. Burns*, 8 Cow. 121. *Merritt vs. Arden*, 1 Wm. 21.

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JOSEPH WOLFE *versus* ABRAHAM R. LUYSER.

The first count of the declaration set forth, that the defendant, (an auctioneer) received certain goods of the plaintiff, to be sold for him, under an agreement, not to part with or dispose of them, below a certain stipulated price, and that in violation of this agreement he had sold the goods for a sum below that to which he was restricted, and had not accounted for the proceeds.

The second account alleged, that the defendant received the plaintiff's goods for sale, and agreed to "render, as the amount brought by said goods, the full sum of \$500." The breach assigned was, that the defendant had not rendered a just account of the goods, nor paid the "full sum of five hundred dollars."

Upon a general demurrer to these two counts, the *first* was held to be good in substance, although defective for duplicity in assigning the breach: but the *second* count was held to be *bad* on the face of it, for the want of an averment of the sale of the goods.

A defect for duplicity, in pleading, cannot be taken advantage of by a general demurrer, but it must be specially pointed out; and upon general demurrer to two or more counts, if one be good, there will be judgment for the plaintiff.

It is not unlawful to place goods in the hands of an auctioneer for sale, with directions that he shall not part with, or dispose of the same, unless they produce a particular sum; the restriction not being considered as an unlawful means of enhancing the price of the goods, or as an imposition upon fair purchasers.

THIS was an action of *assumpsit*, against the defendant (who was an auctioneer) for selling certain goods of the plaintiff, at a price below that to which he was limited, and also for not accounting for the same when sold.

The declaration contained two special counts; a count for goods sold and delivered, and the usual money counts. The first count sets forth, that the defendant, "being a public auctioneer, "or in the habit and custom of selling goods at public vendue," "in consideration, that the plaintiff would deliver to the defendant divers goods to be sold by him, for and on account of the "plaintiff," &c. "undertook and promised, to sell and dispose "of the said goods" "at and for no less money, than a certain "rate and fixed price set thereon by the said plaintiff," "and "which the defendant agreed to obtain," "as the just and true



" estimate of the plaintiff's value of said goods ;" " the said defendant being strictly charged not to sell or dispose of the said goods in any other manner whatever : and the said defendant undertook, and faithfully promised, that he would not make sale, or dispose of said goods, otherwise than as he was charged and directed ; and thereupon undertook, and faithfully promised, to render a just and true account of the sale of said goods," &c. to the plaintiff, and pay him thereon, the full sum of five hundred dollars, (being the full amount of the price set on the said goods by the plaintiff as aforesaid,) whenever, after the sale thereof, the said defendant should be thereunto requested." " That the said plaintiff, confiding, &c. did afterwards, &c. deliver the said goods to the defendant," " for the purposes aforesaid ; yet the said defendant not regarding his said promises, &c. did afterwards, &c. for and on account of the said plaintiff, sell and dispose of the said goods, without the assent or permission of the said plaintiff, for divers sums of money, in the whole amounting to a less sum than that to which he was restricted, and at a rate much less than that which the said defendant promised to obtain for the said goods." The breach assigned was, " That the defendant had not rendered to the plaintiff a just and true, or other account of the sales of the said goods, than that in the said last sale mentioned, nor had he paid the said plaintiff the difference of moneys thereby arising, and due to the said plaintiff, as in and by the said promises and undertakings," &c. " although often requested," &c.

The second count alleged, that the defendant, in consideration that the plaintiff had delivered to him certain other goods, of the value of \$500, to be sold and disposed of by the defendant, at a certain price set thereon by the plaintiff, " and by the said defendant agreed to, as the lowest sum to be taken for the said goods, or for which the said defendant might sell and dispose of the same," " undertook to render, as the amount brought by said goods, the full sum of five hundred dollars, whenever afterwards requested." The averments then were, that " although the defendant received the goods last mentioned, for

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" the purposes last aforesaid, yet the said defendant had not rendered a just account of the said last-mentioned goods, nor paid the full sum of five hundred dollars to the plaintiff, although afterwards requested," &c.

The defendant demurred to these two counts, generally, and Mr. *J. W. Gerard*, in support of the demurrer, contended,

I. That the first count was to be considered as a declaration, in substance, against an *auctioneer* for selling goods at a certain price, below that to which he had been limited by the owner. This limit, he contended, could not lawfully be imposed, because it is expressly provided by statute, [2 R. L. 161. sec. 1.] that all goods sold at auction shall be struck off to the highest bidder. Here, the plaintiff sent his goods to the auction to be sold publicly, and directed him, at the same time, not to allow them to be struck off, unless they brought the sum of five hundred dollars; and the auctioneer assented to the restriction. This is the fair import of the contract, as set forth in the first count of the declaration; and the defendant is now called upon to answer for a violation of the restriction. In this point of view, he contended, that the action could not be sustained, the contract being against the statute, and against public policy.

The law looks with a jealous eye upon all attempts to evade the fairness of sales by auction, and intends that they shall be *absolute*. When goods are once publicly offered, the highest bidder has a right to become their purchaser; and all contrivances to enhance their value, by unfair means, are unlawful. Hence, "*puffers*" cannot be lawfully employed to swell the price of commodities at auction; and their interference renders such sales void. [2 Com. on Con. 218. 1 Ib. 37. 4 Cowen's Rep. 717. 3 John. Cas. 29. 6 John. Rep. 194. 8 Ib. 444.]

In this case there could be no fair purchase, because the goods were not to be disposed of, unless they produced a specified sum. The sale was not to be absolute, but conditional. The highest bidder was to have the goods, provided he offered a sum sufficient to cover the owner's limits. This was against all fair understanding at auctions, and imposed upon the purchaser,

who of course would be ignorant of all limits and restrictions. The prohibition of the law, which forbids the employment of third persons to raise the price of goods unfairly, by pretended bids, extends to the auctioneer himself. He has no right to become the puffer, but must allow nothing but real and fair competition, among *bona fide* purchasers. [1 *Com. on Con.* 257. *Bezwel v. Christie*, *Cowp. Rep.* 395. 2 *Kent's Com.* 425. 8 *Term Rep.* 93. 95.]

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Although there is no express averment in the first count, that these goods were sold at auction, still, as the declaration is against an auctioneer, in his capacity of auctioneer, the legal intendment of the various allegations is applicable to him in that capacity.

II. The second count is clearly bad, upon the face of it. It sets forth, "that the defendant, in consideration that the plaintiff had delivered to him certain goods to be sold and disposed of at a certain fixed price, undertook to render, as the amount brought by said goods, the sum of five hundred dollars," without any averment as to the sale of the goods. It appears from this count, that the goods were delivered to the defendant, to be sold for a stipulated sum; and the gist of the action is, that he has sold them for a sum below that to which he was limited by the plaintiff. But as there is no averment of sale, it does not appear that the contract has been violated. It may be, that the defendant has not been able to sell the goods at all, and he may now have them on hand. At all events, there could be no breach of the promise set forth in this count, until after a sale; and a sale must therefore be averred.

As the plaintiff has sought to charge the defendant, as auctioneer, and to make him liable for a default in his particular business, the court will infer that the goods were sold at auction, and at a price below that to which the defendant was limited.

Mr. Judah, for the plaintiff, *contra*, contended, that the objections raised to the first count of the declaration, could not properly be interposed as a defence to the action, that the employment of persons to enhance the price of goods, sold at auction, by fictitious bids, might lay the foundation of an action against the

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auctioneer, or might constitute a good defence, on the part of a purchaser, refusing to take goods struck off to him: but that neither the arguments used, nor the cases cited, were applicable to this case.

The allegation in the first count, that the defendant was an auctioneer, is matter of inducement merely, and cannot form the subject of demurrer. But suppose it were matter of substance, and suppose the goods were actually sold *at auction*, by the defendant, in the manner complained of by the plaintiff; there is nothing unlawful in this: nor is there any thing in public policy to prevent it. The declaration merely states, that the goods were delivered to the defendant, to be sold by him, not below a *fixed price*. Any person having goods for sale, may deliver them to an auctioneer, with directions not to part with them below a certain sum; and the auctioneer may set them up at that price, in the first instance, if he thinks it expedient; or he may allow them to be run up to the stipulated sum by fair competition. It is admitted, that the employment of "*puffers*" is unlawful, and that a contract for the purchase of goods, under such circumstances, could not be enforced.

But the owner may lawfully give directions to the auctioneer, not to part with his goods below a certain sum, and any arts resorted to afterwards, by the auctioneer for the sale of goods, could not make void the contract between him and the owner.

The seller is not compelled to sacrifice his goods, because he offers them at auction; but may put them up at a certain price, and still retain the advantage of fair competition.

The plaintiff is willing to abide by the law as laid down in *Beesell v. Christie*, although by modern practice the strictness of Lord Mansfield's rules have been considerably relaxed. An auctioneer, according to the adjudged cases, has a perfect right to set up his goods, in the first instance, at a certain sum, and then dispose of them to the highest bidder, if he exceeds the limits.

This question was before the court of Common Pleas in the case of *Hazel v. Dunham and others*.\* That court held, that

\* The case of *Hazel v. Dunham*, was tried in the year 1819, before Peter A. Jay, Esq., then Recorder of the city of New-York. Considering the genera

there was nothing unlawful in restricting an auctioneer to certain limits, and this opinion is supported by a case decided in Pennsylvania. [11 *Serg. & Rawle's Rep.* 87.]

The doctrine of Chancellor Kent, as laid down in his Commentaries. [vol. 2 p. 425.] does not apply to a case like the present; but has reference entirely to the unlawful "puffing" of goods at auction to enhance their prices.

But the restriction set forth in the declaration, in this case, does not apply to the defendant, in his capacity of auctioneer exclusively: he had a right to dispose of the goods at private sale, but still the restriction would remain. We do not say that he has sold the goods *at auction*, for a sum below our limits; but the averment is, that he *has sold* the goods at a price below that to which he was restricted. In what manner he has disposed of them does not appear; and the court will not infer that they were sold at auction, unless such inference is inevitable.

The two counts objected to, are framed from precedents given by Mr. Chitty in the 2d vol. of his treatise on Pleading, p. 162. The *substance* of the first count is, beyond all question, good, and if there be any defects of form, they should have been taken advantage of, by *special* demurrer. If either of the counts be good, the court will, upon a general demurrer to both, give judgment for the plaintiffs.

*Per curiam.* The first count of the declaration is good in substance, although defective for duplicity, in assigning the breach of the defendant's contract. His agreement was not in the alternative "to render a just and true account," or "to pay" the sum set forth in the declaration. The same neglect to account was not, of itself, a breach of the defendant's undertaking, and the action is evidently brought, to recover the difference between the sum for which the goods were actually sold, and that to which the

question presented by it as one of considerable interest in a commercial community, the reporter applied to Mr. Jay for a copy of the opinion delivered by him in that case; and having been obligingly furnished with it, is enabled to present it to the reader at the end of this volume.

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defendant was restricted. But a defect in the declaration for duplicity, cannot be taken advantage of by general demurer : it must be specially pointed out, and the defendant cannot therefore avail himself of it, in the present state of the pleadings.

- If these goods were to be sold by the defendant *at auction*, it does not follow that the contract between the parties was corrupt, because the plaintiff limited the sale of his goods to a specific sum. It might be, that he directed the defendant *to offer* them at, or not below, a certain price ; and there certainly would not be any thing unlawful in such a direction. But the first count does not state that the defendant undertook to sell the goods at auction. It does not appear that they were not actually disposed of at private sale ; and there is nothing in the declaration which compels the court to infer a sale by auction. The declaration, it is true, commences by setting forth that the defendant was an auctioneer ; but there is no allegation that he *received* the goods as auctioneer, or that they were to be sold at public auction. The averment is, that the goods were disposed of for a sum below that limited by the plaintiff ; but the *capacity* in which they were received, and the *manner* in which they were sold, nowhere appears upon the declaration. It comes then simply to this, that the defendant received a certain quantity of goods of the plaintiff, under an agreement that he should not part with them, for a sum below a particular amount specified. In violation of this contract, he sold the goods at a price below the limits fixed by the agreement, and the plaintiff brings this action for the injury thus sustained. There is nothing upon this state of facts to prevent his recovery upon the first count.

But the second count is clearly bad upon the face of it. The contract, on the part of the defendant, was to *sell* the goods, and account for *the proceeds* : and it is evident that he cannot be in default before they are disposed of. He did not undertake to sell the goods, *at all events* ; but his promise, as set forth in the declaration, was, not to part with them for less than a fixed sum. If, therefore, the goods have not been sold, the defendant is not yet answerable ; and there is no averment in the second count of a

sale of any kind either above or below the fixed limits, while the breach is for not accounting. Until a sale takes place there can be no violation of the contract; and as this count contains no averment of sale, it is clearly bad, for the want of it. But wherever there is a *general* demurrer to a declaration, consisting of several counts, if any one of them prove good, there must be judgment for the plaintiff. In this case, therefore, as the first count is *in substance* good, there must be judgment for the plaintiff upon the demurrer.

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*Judgment for the plaintiff on the demurrer.*

[S. B. H. Judah, atty. for the plff. H. M. Western, atty. for the dft.]

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JOSEPH BARLOW

*versus*

THE EAGLE FIRE INS. CO. OF THE CITY OF NEW-YORK.

**Taxation of costs.** Preliminary proofs, in an insurance cause, are not to be taxed in the plaintiff's bill of costs.

The plaintiff cannot charge for *drafting* as many *subpoenas* as he has witnesses: but must prepare one draft, and from that engross the others.

THE attorney for the plaintiff in this cause, in preparing his bill of costs, charged for drafts and copies of the affidavits of five different persons, whose testimony was necessary to establish the preliminary proofs of the plaintiff, and also for administering the oaths. He likewise charged for the notarial certificate, copy and seal, together with inventories to be annexed thereto, and copies to be served: and also for the draft of a separate *subpoena* for each witness summoned, and for engrossing copies for each *subpoena*. These items being contested on the taxation, it was submitted to the court to decide, whether they were taxable, and to what extent.

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*Mr. Anthon*, for the plaintiff, contended,

I. That the preliminary proofs were *necessary proceedings* in the cause, and therefore taxable. In *Corlies v. Cummings* [7 Cowen, 157.] the Supreme Court considered the words of the fee bill as entitled to a more liberal interpretation than was given to them in the case of *Kenny v. Van Horn*, [2 John. R. 107.] the statute being broader than the act on which that decision was founded. That the preliminary proofs are proceedings in the cause, within the meaning of the act, was evident from the fact, that they are to be produced at the trial, and the judge is to pass his opinion upon their sufficiency.

II. That each *subpoena* under the seal of the court is a new writ, and taxable as such. It was not the mere engrossing of a prior writ: for each *subpoena* requires anew *præcipe*, and a new seal, and all the power over the witnesses named therein was derived from the *indentical writ*, and not from any prior writ, of which it is supposed to be an engrossed copy. That therefore every new *subpoena*, required in the cause, was taxable as a new writ.

The Court, however, disallowed all the items relative to the preliminary proofs; but permitted the plaintiff to charge for drafting and engrossing ONE *subpoena*, and for engrossing one copy, to be sealed for every four witnesses.

[Edward Anthon, *Atty. for plff.* J. O. Grim, *Atty. for defl.*]



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1888.

BENJAMIN HARROD

*versus*FRANCIS BARRETTO, JUN., CHARLES N. S. ROWLAND, JAMES  
B. MURRAY, AND SAMUEL WHEELER.Harrod  
v.  
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In an action upon a judgment obtained in the courts of another state, it is competent for the defendant to show, by a special plea, that the court in which the judgment was rendered had no jurisdiction, either of his person or the subject matter. But every presumption is in favour of the jurisdiction of the court which rendered the judgment; and the plea must negate, by positive averments, every fact from which that jurisdiction might arise.

Where, therefore, to an action of debt on a judgment obtained in the "Court of Common Pleas for the county of Suffolk in the commonwealth of Massachusetts," the defendants pleaded, that at the time of rendering the said judgment, and from the time of the commencement of the action upon which the same was founded, up to the time of its rendition, they "were, and ever since have been, inhabitants and residents of the city of New-York," and "never were inhabitants of, or residents in, the state of Massachusetts, nor subject or amenable to the laws" of that state, "nor within the jurisdiction of any of its courts;" that "the first process was never served upon them," "nor did they, or either of them, ever have any notice of said suit:" the plea was *held* to be bad upon demurrer, because it did not contain a direct and positive averment, that the defendants *had not appeared* in the suit in which the judgment was obtained.

THIS was an action of debt on a judgment obtained by the plaintiff against the defendants, in the Court of Common Pleas for the county of Suffolk in the state of Massachusetts. The defendant Murray suffered judgment to go against him by default, and Wheeler was returned by the sheriff, "not found." But Barretto and Rowland appeared and pleaded, "that they ought not to be charged with the said supposed debt, by virtue of the said supposed judgment in the said declaration mentioned," because "at the time of the commencement of the suit in which the said supposed judgment was rendered, and at the time the said supposed judgment was rendered, and during all the time between the time of the commencement of the said suit, and the rendering of the said supposed judgment, the said defendants" "were, and ever since have been, inhabitants and residents of the city of New-York in the state of N. Y. and never were inhabitants

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of, or residents in the state of Massachusetts, nor subject or amenable to the laws of the state of Massachusetts, nor within the jurisdiction of any of the courts thereof; and that the *original process* in the suit in which the said supposed judgment was rendered, was no otherwise served upon *these* defendants," "than by attaching a *certain steam engine*; and that the said first process was not served upon them, or either of them, nor read to them, or either of them; nor was any copy thereof left with them, or either of them; nor did they, or either of them, ever have any notice of the said suit."

To this plea there was a general demurrer.

The cause was argued by *Mr. E. C. Benedict* and *Mr. F. J. Betts*, for the plaintiff, and by *Hugh Maxwell, Esq.* for the defendants,

For the plaintiff it was contended,

I. That *nul tiel record* is the only proper plea to debt on judgment, except matters arising subsequently to the judgment.

II. If any facts may be alleged against a record, the facts set up in this plea are not of that class.

III. If the *principle* of the plea is good in its full extent, the plea itself is bad.

By the constitution of the United States full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state; and the congress may prescribe the mode of proving such records, and the effect thereof. This power congress exercised in the act of May 26th, 1790, declaring that records authenticated as there prescribed, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence they are taken. These provisions have been brought before the Supreme Court of the United States; and that tribunal has declared, that their letter and their spirit are the same. That the judgment of a court of a sister state is to have the same credit, validity and effect, when sued upon here, that it would have if sued upon in the state where it was rendered. And the same rules of pleading are to be applied here, as would be applied there. This court is then, *pro hac vice*, to be

considered as a Massachusetts court, and its rule of decision is to be sought in the decisions of the Supreme court of Massachusetts, in actions upon the judgments of their own courts. The laws of the United States having declared, that the attributes with which the judgment of any state court may be clothed by the law of that state, shall be acknowledged and remain the same in every other state; the only inquiry is, what those attributes are—"what is the effect of the judgment in the state where it was rendered." [*Const. U. S. art. 4. § 1. Laws U. S. 2d ed. vol. 2. p. 102. 7 Cranch, 481. 3 Wheat. 234. 2 Dall. 302. 1 Pet. Cir. Court Rep. 74. 155.*]

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The court of common pleas of Massachusetts is a court of general jurisdiction, and the common law is the law of Massachusetts. By the common law the judgment of a domestic court of general jurisdiction is conclusive upon the parties, and cannot be denied, except by the plea of *nul tiel record*. This results from the nature of a record: it being the highest evidence: its pre-eminent attribute being that of undeniable truth. The record must be admitted or denied; if denied it can only be by *nul tiel record*; if admitted, there can be no defence except matters subsequent to the judgment; for a party, cannot by his plea admit the existence of the record, and deny the debt. It is conclusive evidence of the existence and justice of the demand, and no averment can be allowed against it, or its obvious meaning;—against it, no witness can prevail. Even the want of jurisdiction in the court does not affect it, unless it appear upon the face of the record; and then it is taken advantage of under the plea of *nul tiel record*. Erroneous judgments may be enforced till reversed. They cannot be avoided by plea. [*Cowell's Law dict. tit. Record. Jac. do. do. Co. Litt. 260. a. 1 Chit. Plead. 354. 481. 2 H. Black. 402. 2 Bur. 1005. 5 Mass. 94. 2 do. 535. 9 do. 469. 17 do. 545. 4 do 303. 5 do 448. 12 do. 270. 16 do. 532. 1 Pick. 435. 10 Serg. & Raw. 240. and cases before cited.*]

2. But if a special plea may be pleaded to debt on judgment, the matters pleaded must not be such as merely show the judgment erroneous, it being a settled principle, that judgments which are erroneous, stand in force, and may be executed or enforced by action of debt until reversed; and they cannot be avoid-

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ed on account of error collaterally, or by plea. Yet the matters set up in this plea, if they affect the judgment at all, merely show it to be erroneous. Error lies on a void judgment in any case. That the court had no jurisdiction,—that the defendant was absent, had no notice of the suit, nor any attorney to appear, may be assigned for error:—as error in law, if they appear on the record—as error in fact, if they do not, for any matter of fact, may be assigned for error, which if it appeared upon the record, would have proved it erroneous. The plea is therefore bad.—[13 *Mass.* 264. 9 *do.* 151. 4 *Cow.* 457. *Bac. Ab. tit. Error. Vin. Ab. do.* 2 *Mod.* 308. 2 *Cranch* 126. 4 *do.* 421. 10 *Wheat.* 199. 14 *Mass.* 233. 11 *do.* 413. 1 *Arch. Prac.* 246. 9 *John.* 159.]

3. But if the plea be good in principle, it is still insufficient.

The statement in the plea, that “the defendants were not amenable to the laws or within the jurisdiction of the courts of Massachusetts,” is not a fact: it is a mere inference of law. We could not take issue upon it. If the plea does not contain facts from which that inference necessarily follows, then it is bad. The defendant must set up a defence totally inconsistent with the plaintiff’s right to recover. If this plea may be true, and the court still have had jurisdiction, the plea is bad; and as every presumption is in favour of the jurisdiction of the court, the record is conclusive of it, till it be clearly and explicitly disproved. [1 *Chit. Plead.* 519. 4 *Cow.* 292.]

The appearance of the defendants would give the court jurisdiction: it must be therefore explicitly denied. [4 *Cranch*, 428. 15 *John.* 144. 8 *Cowen*, 314. 6 *Wheat.* 130.]

The plea should also deny service of process upon, and notice to the *other* defendants, they being partners, it being a general rule, that where several are concerned in partnership, notice to one is notice to all [1 *Camp.* 82. 404. *note.* 1 *Maule & Sel.* 259.]

The case of *Shumway v. Stillman* [4 *Cow.* 292.] decides this case. Sutherland, J. there says, the plea may be literally true, and yet the defendant may have entered special bail in the action, and may have appeared and litigated the cause by attorney upon the trial, and the plea is therefore bad. The remark loses none of its force when applied to this case. This plea may be literally

true, and yet all the defendants may have had notice that the suit would be commenced, and instructed their attorney to appear and confess the action. The other two defendants may have been in Massachusetts, been arrested, and, by virtue of general or special powers, put in bail for the whole, appointed an attorney for the whole, and made the best possible defence to the action. The truth of this plea is then perfectly consistent with the authorised appearance of an attorney for the defendants and with the fullest and most hostile defence of the suit. It is therefore bad.

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*Mr. Hugh Maxwell, contra.*

There can be no doubt, that it is competent for a defendant against whom a judgment has been rendered in another state, to plead specially, in an action brought upon that judgment here, that he has never been within the jurisdiction of the court which rendered the judgment, and that he was never summoned by the service of any process upon him *personally* to appear and answer to the action. The judgment of such a court is conclusive upon the defendant, only when he has been personally notified to appear, or has subsequently submitted to the jurisdiction of the court.

Where the action is commenced by the attachment of some article of property belonging to the party, according to laws which are peculiar to certain of the states, and particularly to those of New-England, the process is to be regarded as a proceeding *in rem* merely. The defendant cannot be concluded by it; for it may well be, that he has a good and just defence to the action; and yet, from an entire ignorance of the existence of the suit, all opportunity of interposing such defence may be totally cut off. It was never intended by the constitution of the United States, that "full faith and credited" should be given to a judgment like this. But where the parties have all appeared, and have had full opportunity to protect their rights, in such cases a judgment rendered in one state of the union, is conclusive evidence in every other state state. This is not only the true construction of that clause in the constitution upon which the plaintiff relies, but it is in strict accordance with adjudicated cases. Indeed, the question can scarcely be considered as open for discussion in the courts of

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this state. Our decisions have been uniformly in favour of the plea, and our courts have never considered a defendant as concluded by a judgment rendered by a court which had no jurisdiction, either of his person, or the subject matter of the controversy. To give this effect to such a judgment, would be in itself highly oppressive and unjust, and is not warranted by any sensible exposition of the constitution. The *principle* of this plea is therefore correct, and well supported by authorities. [15 J. R. 141. 19 "Ib. 162." 4 Conn. R. 294.]

The defendants are not concluded by the case of *Mills v. Dur-ye*, for this point is not decided there. The Supreme Court merely ruled that *nil debet* was not a sufficient plea to an action brought upon a judgment obtained in another state. But the question, whether the effect of such a judgment might not be avoided by a *special plea*, is expressly reserved.

The case from Peters' Reports is not in point; for there the defendant had *appeared*, and there can be no doubt that a subsequent appearance to the action may be tantamount to a previous personal summons to appear.

As to the plea itself, there is nothing in the record which shows the defendants were partners, and no *presumption* to that effect can be drawn from it. Here is no evidence except that presented by the record, and there is no *averment* that the defendants were partners. They are not therefore to be prejudiced by any inference to be drawn from the facts set forth.

But the plea is sufficient in itself. It denies all personal notice of the action in Massachusetts; it denies the jurisdiction of the courts of that state over the persons of the defendants, and sets forth clearly the manner in which the suit was actually commenced. This, of itself, is sufficient to show, that the action was commenced and prosecuted without personal notice of any kind to the defendants. But the plea goes further, and removes all doubt upon the subject, by averring that the defendants were *never subject or amenable to the laws of the state of Massachusetts, nor within the jurisdiction of its courts*. If the defendants had, subsequently to the commencement of the action, *appeared* and answered to the suit, then they would have been within the juris-

diction of the courts of Massachusetts, and amenable to the laws of that state. The plea therefore is sufficient, not only to show that the defendants never had personal notice of the action in Massachusetts, but to rebut every presumption of their having submitted to the jurisdiction of the court which rendered the judgment.

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OAKLEY, J.

This is an action of debt, on a judgment obtained by the plaintiffs, against the defendants, Barretto and Rowland, together with Murray and Wheeler, in the Court of common Pleas, for the county of Suffolk in the state of Massachusetts.

Barretto and Rowland appear in the suit, and plead, that at the time of the commencement of the suit, in which the said judgment was rendered, and from that time, to the time of rendering the same, they were inhabitants and residents of the state of New-York, and never were inhabitants or residents of Massachusetts. That the original process in the said suit, was in no other manner served upon them, than by attaching a steam engine : and that they never had any notice of the said suit.

To this plea there is a general demurrer.

In support of this demurrer, it is contended, that the plea is bad, because it seeks to draw in question the validity or effect of a judgment ; which, it is said, cannot be done, except by a plea of *nul tiel record*.

Previous to the decision of the case of *Mills v. Duryee*, [7 *Cranch*, 481.] the question, arising on this demurrer, repeatedly came under the consideration of the Supreme Court of this state. In *Kilburn v. Woodworth*, [5 *J. R.* 41.] that court held, that a judgment, like the present, did not bind the defendant personally : that not being in the state of Massachusetts, he could not be served with process under the authority of that state, and that the attachment of his property could be considered only as a proceeding *in rem* and could affect only the property attached.

In *Robinson v. Executors of Ward*, [8 *J. R.* 90.] and in *Fenton v. Garlick*, [*Ibid.* 197.] the same doctrine was laid down, and it was again repeated in *Pawling v. Executors of Bird*,

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[13 J. 206.] which appear to have been decided before the publication of the opinion of the Supreme Court of the United States in *Mills v. Duryee*.

It was contended at the bar, that these decisions must be considered as overruled, by the judgment of the Supreme Court of the United States, in *Mills v. Duryee*. In that case it was held, that *nil debet* was not a good plea to an action founded on a judgment of a court of another state. The Supreme Court of this state has had occasion to determine the effect and operation of that decision.

In *Borden v. Fitch*, [15 John. 140.] all the cases on the subject are reviewed. The decision in *Mills v. Duryee*, was particularly considered; and it was held, that it decided nothing more, than that a judgment was conclusive, "where the defendant was arrested, or had in some way appeared." Again, in *Andrews v. Montgomery*, [19 J. 164.] the court say, that the case of *Mills v. Duryee*, was never intended to be carried so far as to preclude a party from showing that a judgment against him had been obtained fraudulently; or that the court had not jurisdiction of his person. And it is declared, that the authority of that case must be received with that qualification. In the more recent case of *Shumway v. Stillman*, [4 Cow. 292.] the action was debt, on a judgment obtained in Massachusetts.

The defendant pleaded, in part, the fact set forth in the present plea; and upon a demurrer, the same questions were raised which exist in the case now before us. The court again examine the case of *Mills v. Duryee*, and they say, that it does not decide the point involved in the case, then under their consideration. They adopt the principle laid down in *Borden v. Fitch*, and *Andrews v. Montgomery*. And Sutherland, J observes, that it cannot be doubted, that "in an action upon a state judgment, "it is competent for the defendant to show by a special plea, that "the court in which the judgment was rendered, had no jurisdiction, either of the subject matter or of the person."

The true doctrine, then, as derived from the case of *Mills v. Duryee*, in connexion with these decisions of our Supreme Court, seems to be, that where it is intended to deny the existence of the judgment in pleading, it must be done by the plea of *nil tiel*



record ; that the plea of *nil debet* is not good, and that the consideration on which the judgment was rendered, cannot be enquired into under such a plea ; but that, when the record itself is admitted, its effect between the parties in an action on it, in another state, may be defeated by a special plea, denying the jurisdiction of the court ; or averring fraud in obtaining the judgment.

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After such a long and uniform course of decisions on this subject, by a court of supreme jurisdiction, the question as to the general character of this plea, cannot be considered an open one, in this court, and it is unnecessary to enter more minutely into an examination of the numerous cases bearing upon the point. It is sufficient to say, that the doctrine of our Supreme Court is in accordance with the uniform course of decisions in the courts of the other states on this subject.

It is contended, in the second place, that if the principle of the plea can be supported, it is defective in its averments, as it does not allege enough to show that the court in Massachusetts had not jurisdiction of the persons of the defendants.

It is said in *Shumway v. Stillman*, (and there can be no question of the correctness of the remark) that every presumption is in favour of the jurisdiction of the court which rendered the judgment. The record is *prima facie* evidence of it. The plea then must negate every fact from which that jurisdiction might arise ; and that by direct averment, and not by way of inference. The plea in question avers, that the defendants were inhabitants and residents of New-York, during the whole time from the commencement to the termination of the suit in Massachusetts : and that no process in the suit was ever served on them. The latter averment is immaterial. If the defendants were never within the territorial jurisdiction of Massachusetts, no process could have been personally served on them. In *Kilbourn v. Woodworth*, the Supreme Court say, "the domicile of the defendant was in this state, and being in person here, he was not and could not be served with process from the court in Massachusetts." The plea also avers that the defendants never had notice of the suit. This, I also consider an immaterial averment. If issue

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were taken on it, and it were found for the plaintiff, it would not follow that jurisdiction of the persons of the defendants would be thereby established, because that notice may have been served upon the defendants while inhabitants and residents of New-York. In that case the actual service of notice would have been a mere nullity. If the court in Massachusetts could not have acquired jurisdiction of the persons of the defendants, by the service of formal process out of the limits of that state; much less could it have been done by the service of any other notice.

The only material averment, then, in this plea, is that the defendants were inhabitants of New-York, from the commencement to the end of the suit in Massachusetts. The same averment, in substance, was contained in the plea in *Shumway v. Stillman*; and the Supreme Court held it bad, because it did not aver, that the defendant had not appeared to the action. An appearance by attorney, would have given the court in Massachusetts, jurisdiction of the persons of the defendants. And such may have been the case in the present instance, for any thing alleged in this plea, unless the averment of want of notice of the suit, is equivalent to an averment of no appearance in it. This cannot be, unless by way of inference merely, as it has already been shown, that there may have been actual notice of the suit, under circumstances in which it would have been altogether inoperative.

The plea also contains an averment, that the defendants were never subject or "amenable to the laws of the state of Massachusetts, nor within the jurisdiction of any of the courts thereof." This is mere matter of law, and cannot be pleaded. No issue could be taken on such an averment. Whether the court in Massachusetts had, or had not jurisdiction of the persons of the defendants, must be determined by the fact, either of their domicile in that state, or by their voluntary appearance to the action commenced there.

This plea, then, ought to have contained a direct and positive averment, that the defendants had not appeared in the suit, in which the judgment in question was obtained. This averment, coupled with that of their residence in the state of New-York,

would have covered the whole ground of defence, and clearly shown, that the court, rendering the judgment, could not have had jurisdiction of the persons of the defendants.

The result is, that there must be judgment for the plaintiff on the demurrer.

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*Judgment for the plaintiff on the demurrer, with  
leave to the defendant, to amend their plea.*

[Betts and Benedict, attys. for the plff. W. P. Hawes, atty. for the dfts. Barretto  
and Rowland.]

#### SAMUEL PENNY AND OTHERS *versus* ISAAC VAN CLEEF.

An application to amend the declaration, will at all times be granted upon payment of costs, where such amendments do not operate as a surprise upon the defendant, nor subject him to injury. But the defendant, in such a case, will be permitted to withdraw his pleas, and plead again, *de novo*.

*Mr. C. C. King*, in behalf of the plaintiffs, at the last August term of this court, moved for leave to amend the declaration in this cause by inserting special counts therein.

*Mr. G. W. Strong*, for the defendant, opposed the motion; and contended, that if the application were granted, that the plaintiffs ought to stipulate to accept a common notice of set-off, instead of special pleas, if such pleas should finally be required for the defence. But the court ruled, that the plaintiffs had a right to amend their declaration, as a matter of course, before plea pleaded, upon payment of costs; and they therefore granted the motion.

And now, at this term, after the defendant had put in his pleas, *Mr. King* again moved for leave to amend the declaration a second time, stating as a reason, that a mistake had been made in setting out the quantities of certain goods specified in the special

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counts, for which promissory notes had been promised, but never furnished.

*Mr. G. Griffin*, for the defendant, stated, that he had a judgment against the plaintiffs for an amount equal to their claim : that the promise to give a promissory note was denied, and that the real object of the plaintiffs was to avoid the set-off.

*Per Curiam.* The plaintiffs are entitled to the effect of their motion, as a matter of course : an application to amend never being refused where it does not operate as a surprise upon the defendant, nor subject him to injury. The plaintiffs, however, must pay the costs of the motion ; and the defendant has leave to withdraw his pleas, and plead again *de novo*. He cannot be subjected to any injury by the amendments, because he will have every opportunity to shape his defence according to the exigency of the case.

*Motion granted on payment of costs.*

[C. C. King, *atty. for the plffs.* G. W. Strong, *atty. for the deft.*]

#### JOSIAH DOW *versus* THE HOPE INSURANCE COMPANY.

Insurance upon goods, *outward* and upon their *proceeds home*, will not cover the same goods on their *return voyage*.

Insurance was effected upon goods from New-York to Batavia, and "upon the *proceeds* thereof home : the goods valued at the sum insured out ; the policy "to be *open* on the *proceeds home*." The identical goods shipped to Batavia were returned to New-York in the same vessel, and damaged upon their return voyage : *Held*, that they were not protected by the policy during the voyage homeward.

THIS was an action of assumpsit, on a policy of insurance upon three cases of merchandise, containing, principally, artificial

flowers, silk goods and muslins, "at and from New-York to Batavia, and other ports in the island of Java, and at and from thence back to New-York." The insurance was "upon goods as per margin out, and upon the proceeds thereof home; the goods valued at the sum insured out; the policy to be open on the proceeds home at 3 1-2 per cent.—to return 1-2 per cent. should Batavia only be used, and the risk end without loss."

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The sum underwritten was \$4000. The cause was tried at the August term of this court, before *Mr. Justice Oakley*. Upon the trial it appeared, that the goods insured were laden on board the ship *Braganza*, transported, without injury, to Batavia, (at least, there was no evidence from which the contrary could be inferred,) and there put under the charge of a *Mr. Kintzing*, to whom they were consigned. While the ship remained at Batavia, the consignee being unable to dispose of the goods, and finding from the state of the markets in Java, that there was no prospect of selling them to advantage, ultimately sent them back again to New-York by the same vessel which carried them out, consigned to the plaintiff by a new bill of lading. It did not distinctly appear from the evidence, whether the goods were landed at Batavia or not, but if landed, the cases were never opened there. Upon the voyage homeward, the goods were injured, apparently by a leak through the deck of the ship; and this action was brought to recover the amount of the damage.

The declaration counted solely upon the loss sustained during the homeward voyage. Upon this state of facts the counsel for the defendants contended, that the policy did not attach upon the same goods homeward, and moved for a non-suit. But the presiding judge, for the purpose of causing the facts of the case to be ascertained by the jury, that the questions of law might afterwards be deliberately considered by the whole court, denied the motion, and charged the jury, that if they were satisfied that the goods were damaged on the return voyage, they should find a verdict for the plaintiff. To this opinion the counsel for the defendants excepted, and the jury found a verdict for \$1000 in favour of the plaintiff.

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At the trial there was also a question as to the sufficiency of the preliminary proofs, which consisted, 1. Of the protest of the master of the Braganza, made upon her arrival at New-York : 2. *The bill of lading*, (dated at Batavia, July, 1826,) consigning the goods to the plaintiff: 3. & 4. The certificates of the port wardens of New-York, of their survey of the goods at the request of the plaintiff : 5. A notice from the plaintiff to the defendants of his intention to appraise, and sell the goods at public auction, under the inspection of the wardens on account of the defendants : 6. The appraisement of the goods : 7. An account of the sales of the same.

These proofs being objected to by the counsel for the defendants, as insufficient to show *interest* in the assured and the loss, were ruled by the presiding Judge as *prima facie* sufficient. And he refused to non-suit the plaintiff upon this objection.

The defendants now moved for a new trial, upon the ground,

1. That the preliminary proofs of loss and interest were insufficient.

2. That the policy by the terms of it did not attach upon the homeward cargo ; and that therefore the plaintiff was not entitled to recover.

Upon the argument of the cause, the court having intimated an opinion that the bill of lading was sufficient proof of *interest* in the plaintiff, *prima facie*, the first point was abandoned by the counsel for the defendants.

Upon the second point, *Mr. David B. Ogden*, for the defendants, contended, that the nature and quality of the goods furnished evidence that the defendants never intended to insure the same goods to Batavia and *back* to New-York. He admitted, that the policy was to be construed according to the intentions of the contracting parties ; but contended that it could never have entered into the contemplation of either party, that the *same* goods would come back from Batavia in the same vessel which carried them out. They were not shipped abroad for the purpose of being brought back in their original form and condition ; but were to be *disposed* of ; and the *proceeds* of such disposition were to be returned to New-York. The very word, "*proceeds*," indi-

cates something besides the original goods, and shows that the parties contemplated that the outward shipment, consisting of delicate goods, would be converted into *other* goods, (probably the usual produce of the Island of Java) to be returned home as *proceeds*.

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One evidence of intent is drawn from the fact, that the outward goods were *valued*, while the policy upon the *proceeds* was *open*; clearly indicating that the parties supposed that the outward shipment, whose value was known and fixed, would be converted into *other* things of unknown and uncertain value.

The defendants (he said) were willing that a liberal construction should be given to the word used: and it might perhaps be held to mean any thing, except the *identical goods* themselves.

The case of *Whitney v. The American Ins. Co.* [3 Cowen. 210.] was perfectly consistent with the construction contended for by the defendants. There the plaintiff effected insurance upon a quantity of wine to Batavia, and upon its *proceeds* home. The consignees not being able to sell the wine immediately, received it on deposit, and advanced a sum of money thereon, with which a return cargo was purchased. The court held that the plaintiff was entitled to recover for a loss upon the homeward cargo, upon the ground that it was to be considered as the *proceeds* of the outward shipment. The money advanced upon the deposit of the wine was not a personal loan to Whitney; but an advance produced by the merchandise deposited for sale. *But* for the wine, the homeward cargo could not have been procured, and thus, the latter was considered, as the *proceeds* of the former. But no court ever held, that the *identical goods* insured could, by any construction, be considered as the *proceeds of themselves*.

The defendant would not, for the premium paid in this case by the plaintiff, have insured goods of a delicate fabric from New-York to Batavia, and upon their *proceeds* home, if they could, for a moment, have supposed, that the outward shipment would come back in an unchanged condition, and be considered as covered by the policy. The plaintiff himself never contemplated this state of things; and the word *proceeds* could not, even

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Mr. George Sullivan, for the plaintiff, observed that the only question in that cause was whether the policy, attached to the goods insured on their *homeward voyage* they being the same, which were carried out. The construction, he said, to be given to the contract depended upon the intention of the parties; and if that was clearly indicated by the *words* of the policy, the court would so construe the words as that they should cover the intent.

The term *proceeds* is synonymous with *returns*. In common parlance, the word means *that*, which is produced by the *sale* of goods; it would *literally* mean *money*. But this meaning could not have been that understood by the parties; neither did they mean bills of exchange, which represent money in the mercantile world. When we ascertain the sense in which the parties themselves understood their own language, we shall be able to put a correct construction upon the words of the policy.

The contract of insurance is a contract of liberal indemnity, and the court are only called upon to carry the intention of the parties, in that respect, into proper effect. It is perfectly certain, that it was not the intention of *either* party that the outward shipment should come back in any form *uninsured*. The plaintiff paid his premium upon the *voyage round*; and that affords evidence that the defendants considered themselves bound to indemnify him for all losses upon the *shipment* by the perils insured against, in whatever *form* the same might return to New-York. The policy, it is true, is *valued* upon the goods outward, but it is *open* upon their return. The reason for this obviously was, to protect the underwriters: that in case the *proceeds* of the shipment should exceed the valuation outward, the assured should not recover an amount beyond that valuation.

There is an obvious incongruity in the use of the word "*proceeds*;" and the court is only called upon to put such a construction upon the language used as will cover the *real intent* of the parties. If it can be supposed, that the plaintiff paid, and the defendants received, the *whole* premium upon these goods for an *entire* voyage



from New-York to Batavia, and from thence back to New-York, under any supposition, that they could possibly return *uninsured* and *unprotected*, then, perhaps, the possible contingency has occurred. This case is upon all fours with that of *Havens v. Gray* [12 Mass. 71.] and we do not ask the court to go beyond the good sense of that decision, and the analogous one cited from the 3d of Cowen.

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The counsel for the defendants in those cases contended, for the same narrow construction which is contended for here, and the court refused to adopt it. Why? obviously because the words would bear a liberal construction without violence, and because such a construction would cover the *intent* of the parties, without imposing any burden upon the defendant, which, by the terms of the contract, he was unwilling to assume.

So in this case: The object of both parties was *indemnity* to the plaintiff for any loss occurring by the perils insured against, upon his *shipment* to Batavia, and back to New-York. No matter in what form the outward goods might come back. That was a matter of indifference to the defendants, while the sole object of the plaintiff was, to protect his property, under all circumstances, and in every situation, within the bounds of the contemplated adventure. By adopting the construction contended for by the defendants, the intention of the parties will be defeated, and manifest injustice done to the plaintiff.

JONES, C. J., after stating the facts of the case.

The question in this case is, whether the policy attached upon the goods for the return voyage or not: and the solution of that question turns upon the construction to be given to the term "proceeds." The grammatical sense of the term is the substituted cargo, or property, whatever it may be, which results from, or is acquired by means, of the specified goods. It imports a sale, barter, or other disposition of the outward cargo, or some operation therewith, by which, or by the future investment of the moneys or funds derived therefrom, other goods or insurable property are obtained, on which the policy is to attach for the return voyage. It does not necessarily follow, that the operation is to be effected by a sale or absolute disposition of the goods: the term,

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by a just and liberal construction, will fairly embrace any insurable interest, which the outward cargo, by any arrangement, enables the assured to procure for the return voyage. On that principle the Supreme Judicial Court of the state of Massachusetts, in the case of *Havens v. Gray*, [12 Mass. 71.] where the insurance was upon a specified cargo outwards, and the proceeds of that cargo homewards, held, that a return cargo procured by money and credit advanced upon the outward cargo by a factor, with whom the goods were left for sale on the owner's account, was covered by the policy. The court in that case repelled the narrow construction of the term contended for there by the defendant's counsel, and held, that the intention of the parties was to insure the returns of the outward cargo for the homeward voyage, and whether the return cargo was procured by the sale or exchange of the outward cargo, or by a credit raised upon the deposit of it, could make no difference to the insurers. Indeed, in a liberal sense of the term, the goods purchased by an advance or loan, on the deposit of the outward cargo, are truly the proceeds of such outward cargo; for without that cargo, those goods could not probably have been procured.

The same principles governed the case of *Whitney v. The American Insurance Company*, in the Supreme Court of this state. (3 Cowen, 210.) There the insurance was on wine from Madeira to Calcutta, and on proceeds back; and a return cargo was purchased with money raised by a deposit of the wines. The court held, that the returns were the proceeds of the outward cargo, because the money could not be otherwise raised than by the deposit. And on the same principle, goods purchased by a loan effected on the security of the outward cargo, would be the proceeds or returns of the outward cargo, within the meaning of the contract, and the policy would attach upon them. These cases, and others, arose upon valued policies. The outward cargo had come to a dull market; no sale could be made, except at a ruinous sacrifice; and the advances of the consignees with whom they were deposited for sale, though to nearly the market value, were not sufficient to purchase a return cargo of equal value with the outward loading. And the complaint of the insurers was,

that the assured was allowed to apply the valuation to a reduced cargo, which was intended to be applicable to one of equal value with that which was sent out. Hence the struggle they made was, to confine the meaning of the term employed in the contract to the proceeds of the sale, or the absolute disposal of the outward loading. But the courts in both cases held them bound by the terms of the contract to the valuation on the return cargo, as well as the outward, however inferior in value the returns might be; requiring only of the assured, that the whole market value of the outward cargo at the port of destination should, as nearly as practicable, be invested in such returns. In framing the contract now under consideration, the parties manifestly had the policies in these cases, or one of them, in their eye; and this policy has taken them for its model. But to guard against the consequence of the valuation in the form used in those cases, the insurers have provided in their policy, that the valuation shall be restricted to the outward cargo, and that the insurance shall be upon the actual interest on board on the homeward voyage. This was a prudent precaution, and an improvement on the former policies. In all other respects the clause is the same in substance with those which were the subjects of the adjudication in the cases of *Havens v. Gray*, and *Whitney v. The American Insurance Company*. It follows that the rules of construction applied to those policies are applicable to this. And it is contended, that the liberal principles advanced in those cases entitle the plaintiff to recover in this case. I cannot deduce from either of those decisions any rule broad enough to embrace the case of an outward cargo brought back as it was originally shipped, without having been changed or examined at the port of destination. The court, in the case of *Havens v. Gray*, in the course of their opinion, do say it is true, that the intention of the parties, by the clause in question, was to have insurance upon property on board out and home, and that the premium was taken with that view. But the whole contract demonstrates the meaning of that part of their opinion to be, that the property to which the court referred as the return cargo, was to be the produce of the outward loading, or goods purchased with advances or loans upon it. There is no

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intimation, in any part of the opinion, which encourages the extended construction now contended for, or gives the least countenance to the idea, that the identical goods themselves, composing the outward cargo in the precise state of the original shipment, can in any possible sense of the term be the proceeds of those goods. On the contrary, the court appear to me very clearly to discountenance, if not wholly exclude, such an exposition; for they say that the memorandum means nothing more, in their apprehension, than that the underwriters took the risk homeward of any property, which might be substituted for that which was carried out. Can the sense which that court attached to the term be misunderstood? It was a substitute for the cargo carried out, and not the outward cargo itself, which was to compose the homeward cargo; and to my apprehension, such is the clear and obvious meaning of the policy. The parties both contemplated a change of cargo at the port of destination, and the manifest intention was, that the policy for the voyage home should attach on a new or substituted cargo, and not upon that, which was carried out. The term they have used, is the most appropriate, perhaps, that the language furnishes to express that sense and to define it with accuracy and precision. It so necessarily implies that the returns, to use an apt legal phrase, should be issues of the specified articles that no other meaning can be attached to it. As well might the talent, which the unfaithful servant hid in the earth, and kept unemployed until his master's return, be called the proceeds or produce of that talent, as the identical goods carried out in the primitive state be termed the proceeds of those goods: they are obviously not the proceeds or the produce of the thing, but the thing itself. It is true, that a policy is a contract of indemnity, and such construction is to be given to the words employed in it, as will make the protection it affords co-extensive if possible, with the risks of the assured, during the voyage for which the premium is paid. And we are in interpreting the policy, but to adhere to the strict grammatical sense of the terms of it, and to confine the construction to their literal meaning. Terms are often employed by the contracting parties to express their meaning, which, on a strict and narrow ex-

position of them, would defeat the intention of the parties, and disappoint the object of their contract. And I agree with the assured, that the rule of construction which should restrict him to the proceeds of the outward cargo, in the strictest sense of the term, would be too rigorous. If in any enlarged or general sense of the clause in question, the same goods, which composed the outward cargo, could, without undergoing any alteration, be understood to be the proceeds of those goods, the court might feel bound to give the contract that construction. But a just regard must be had to the language, which the parties employ, and no strained or unnatural sense must be ascribed to it, unless from necessity, to the prejudice of the rights of either party. And more especially is attention to be paid to the written clauses, which are introduced into the policy for special purposes. If these rules are observed, and any meaning is given to the words employed in the clause in question, how can this policy be made to attach on the outward cargo for the homeward voyage? Whether the landing and examination of the goods at the outward port, and the re-shipment of them there would have given the assured any stronger claim, or what change in the outward cargo would have brought it within a liberal construction of the terms of the policy applicable to the homeward cargo, are questions, which if, in any circumstances material, are unimportant in the present case. For it is admitted, that these goods were not examined, if landed, and underwent no change at their port of destination. If the insurance had been upon *all goods on board* the vessel on her outward and homeward voyages the same goods might have been covered all around.

And if this policy covers these goods on the homeward voyage, it is tantamount to an insurance on goods generally for the whole voyage, from the port of loading to the port of destination, and thence back to the port of departure. But that would be an unusual contract of insurance, and would expose the insurers to an increased risk, for which intelligent and discreet underwriters would require a much higher rate of premium. The objection to such a policy in that form would be the increased risk of damage to the goods from their continuing on board the ship for the

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double voyage. The condition of the cargo on its arrival at the port of destination, if bulk is not broken, cannot be known, and if the goods should be then in the incipient stage of decay, from sea damage on the outward voyage, or in a course of deterioration from time, or other causes, they might perish, or be greatly impaired in value by their continuance on board the vessel unchanged and without examination for another voyage; when, if landed at the outward port, the damage would be light, and fresh goods, for a return cargo, would be subject to no injury, except from the perils of a homeward voyage. Hence it is, that insurers so greatly prefer to insure, and so generally use the form of insuring, at and from each port, both outward and homeward; thus securing to themselves a change of cargo, or, at least, the unlading necessary for reloading of the old cargo at the intermediate port. By the clause in question in this policy, and by using the term "proceeds," if a just exposition is given of it, they secure the same benefit; a change of cargo at the outward port, and guard themselves against the accumulated risks of secret damage and decay so incident to the long continuance of the same cargo on shipboard. These were the most cogent reasons, therefore, for the insertion of this term in the contract by the insurers and they are entitled to the full benefit of the protection it affords them, by making a change of cargo indispensable. The assured has no right to complain. A change of cargo must have been his intention, and the return of the same cargo could not have been contemplated. No liberality of construction can entitle him to such an extension of the contract; and he cannot, in my judgment, prevail in his action.

OAKLEY, J., stated the facts of the case, and proceeded as follows.

The point now submitted to the court, is, whether the goods in question were protected by the policy during the voyage from Batavia to New-York. I am of opinion that they were not.

In *Havens v. Gray*, [12 Mass. 71.] there was a valued policy of Insurance on cotton, from Portsmouth (New-Hampshire,) to a port in Europe; the risk so attached to the *proceeds* of the articles

insured, in the return cargo. The outward cargo was not sold, on its arrival at the port of destination, but was consigned to merchants at St. Petersburg, for sale; who, in consideration of the consignment, advanced to the plaintiffs a return cargo, which was laden on board the ship, for the account and risk of the plaintiffs. The ship and cargo were lost on the return voyage to the United States, before any part of the outward cargo was actually sold.

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The question was, whether the return cargo could be considered as the proceeds of the outward cargo, within the terms of the policy. The court held, that it ought to be so considered. *C. J. Parker*, says, "In a liberal sense the return cargo was the proceeds of the outward cargo: for without the latter, the former would not probably have been procured. The consignment to the house at St. Petersburg must be viewed as a deposit of the cargo with liberty to sell and reimburse themselves for the money advanced on the credit of the deposit." And he held the meaning of the clause in the policy to be, that the underwriter took the risk home, of any property which might be substituted for that which was carried out. In *Whitney v. The American Insurance Company*, [3 Cow. 210.] there was an insurance on a quantity of wine out, and returns home. At the port of destination the wine was deposited for sale, and an advance made on such deposit with which the return cargo was procured. The court held, that this was equivalent to an actual sale of the wine, and a purchase of the homeward cargo, with the money arising from the sale; and that the policy therefore covered the homeward, as the returns of the outward cargo.

These cases establish the doctrine that where the insurance is on the proceeds or returns of an outward cargo, the words must receive a liberal construction: and that it is not necessary that the return cargo should be procured by an actual sale of the outward cargo, and an appropriation of the money arising from such sale. It is sufficient that the homeward cargo should be a substitute for the outward, and should spring, though indirectly, from the disposal of the latter, either by sale or deposit; or that it should be procured on the credit, or in consequence of the out-

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ward cargo. But while these cases look to a liberal construction of these words in the policy, they do not lose sight of the necessity of adhering to the evident intent of the parties, and do not mean to intimate that any violence is to be done to the plain letter of the contract. They adhere to the spirit and terms of that contract, when they recognise the principle, that there must be an actual change of the outward cargo, and the substitution of a new cargo for it.

It has been attempted by the plaintiff's counsel, to bring the policy now under consideration within the principle of these cases ; but it is quite clear, that they have no application. Here there was no change of the outward cargo, nor was there any disposition made of it, which can be considered equivalent to a sale without the most forced construction. There was, it is true, a new bill of lading by the consignee at Batavia, to the consign-or at New-York. But this was only intended to re-vest the property in the consignor, which otherwise would appear to be in the consignee, by virtue of the original bill of lading.

It is also clear, that there was no change of risk, as to the subject insured : but there was an extension of it beyond the time contemplated by the terms of the policy. It cannot be doubted, that the parties intended that the risk on the specific goods insured outward, should cease with the termination of the outward voyage : and according to that expectation the rate of premium, and the amount insured, was regulated. The policy was a valued one, on the outward voyage ; but as the amount of the proceeds, when invested in a return cargo, could not be known, it was necessarily left *open* on the homeward voyage. And it is quite manifest, that a premium which might have been adequate to cover the risk on the specific goods (which may have been, and probably were, of a perishable nature) to Batavia, might be altogether inadequate, if the risk were to be extended to their return to New-York.

It would seem, therefore, to be clear, looking solely to the spirit of the contract between the parties, that they intended that there should be an actual change of the goods insured, at the termination of the outward voyage ; and that neither party contempla-



ed the event of the same goods being returned to New-York. Indeed, the provision that the goods outward ~~were~~ *valued*, and the proceeds home left *open*, seems to be conclusive as to the intent and expectations of the parties in this respect.

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If the construction contended for by the plaintiff's counsel appears to be thus inconsistent with the spirit of the policy, it is certainly no less at war with its letter. If any meaning is attached to the word "proceeds," it must certainly be something different and distinct from the goods themselves. And we are not at liberty to reject the word as surplusage, and consider the policy as a simple insurance on the goods out and home.

As, therefore, the risk assumed by the defendants on these goods terminated at Batavia, and as there is no evidence in the case to show that the injury was sustained during the continuance of the risk, there must be a new trial; or if the plaintiff elects, there may be judgment of non-suit entered.

*The plaintiff elected to submit to a non-suit, and a judgment of non-suit was accordingly entered.*

[A. G. Rogers, *Att'y for the plff.* L. A. Johnson, *Att'y for the defts.*]

*Note.*—The plaintiff afterwards brought a new action upon the same policy, in the Supreme Court. Upon the trial of the cause before the Judge of the first Circuit, the plaintiff was again non-suited, and the Supreme Court afterwards refused to set the non-suit aside. It is understood that the cause has been carried to the Court of Errors, where it is now pending.

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RUSSELL ATTWATER *versus* THEODOSIUS FOWLER.

An action for money had and received, brought by a partner in a particular transaction against his co-partner, cannot be sustained, unless there has been a settlement of their joint affairs, and a *balance struck*, although there may have been a complete termination of the partnership.

Therefore, where A. & F. were jointly interested in a purchase of stock in the old bank of the United States, and upon a termination of their speculation, F. wrote to A., enclosed him a copy of his account, exhibiting a balance against A., and informed him that he (A.) would be entitled to receive thereafter "whatever residue there might be on twenty-nine shares of said bank stock;" but which "residue," consisting of dividends on the shares, was afterwards received by F. himself: It was *held*, that he was not liable to account to A. for such dividends, in an action for money had and received. The remedy in such cases, it seems, is to be sought in a court of equity.

THIS was an action of assumpsit for money had and received. The defendant pleaded the general issue, and gave notice of a set-off. The cause was tried before Mr. Justice Hoffman, on the 11th day of June, 1828.

At the trial the plaintiff gave in evidence the following agreement between the parties; and the following letter from the defendant to the plaintiff, viz:

"Memorandum of an agreement made this 28th March, 1812, between Theodosius Fowler, of New-York, of the first part, and Russell Attwater, of St. Lawrence county, of the second part:—  
"Whereas the party of the first part *has lately purchased* United States Bank stock, at a price less than par, and agrees to make such further purchases of the said stock of the late United States Bank, as shall be within his power, when offered to be had, at a price he shall think advantageous: And the said party of the second part, being entitled to subscribe for shares in the new stock of the Bank of America, about to be incorporated, which he engages he will do, to any number of shares he shall be able to obtain: It is now agreed and understood between the said parties, that the purchasers of said stock made by the party of the first part, as well as the stock so subscrib-

" ed for by the said party of the second part, shall be for the *joint*  
 " *interest* and benefit of both parties to this agreement, and they  
 " are to *share equally in the profit or loss* that may arise out of said  
 " business ; each party to charge interest on all money advanced,  
 " but not for services done. In performance of this agreement  
 " the parties bind themselves each to the other.

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" RUSSELL ATTWATER,  
 " THEOD. FOWLER."

" New-York, 26 June, 1812.

" DEAR SIR,

" I have received your two letters, one dated at N. York, and the  
 " other on 20th inst. at Albany. Since you left this our govern-  
 " ment has declared war against Great-Britain, which has had  
 " a wonderful effect on all banking institutions ; so much so, that  
 " all the banks of this city are at par, or thereabouts. The  
 " Union Bank of this city is 5 per cent. under par. In this situa-  
 " tion *I have thought it most prudent for your and my interest,*  
 " *not to subscribe to the 6 million S. ; and it has been a fortunate*  
 " *thing, so far, that I did not purchase any more of the U. S. Bank*  
 " *stock.*

" At foot you will see the statement of our accounts up to the 1st  
 " inst., agreeable to your contract ; the balance being \$3,547,  $\frac{11}{16}$ .  
 " At the same time you are entitled to receive *whatever the resi-*  
 " *due may be on twenty-nine shares of U. S. Bank stock.*

" The above balance of \$3,547,  $\frac{11}{16}$ , is due me from the 1st  
 " inst., and I will thank you to make provision for the payment  
 " as soon as possible. At all events, as times are, it is best for  
 " both of us to have an immediate settlement.

(Signed)

" THEOD. FOWLER."

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Russell Attwater,

To Theod. Fowler Dr.

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|         |                                                      |         |           |
|---------|------------------------------------------------------|---------|-----------|
| 27 Dec. | 20 United States Bank shares, at 97½ per cent.       | - - - - | \$7801 00 |
|         | Interest 27th Dec. to 1st June, 5 months and 5 days, | - - -   | 235 08    |
|         | 8 United States Bank shares, at 97½ per cent.        | - - - - | 3104 00   |
|         | Interest 27th Dec. to 1st June, 5 months and 5 days, | - - -   | 93 54     |

1812.

|         |                                            |           |          |
|---------|--------------------------------------------|-----------|----------|
| 29 Jan. | 30 United States Bank Shares, at 98½,      | - - - - - | 11820 00 |
|         | Interest to 1st June, 4 months and 3 days, | - - - - - | 282 69   |

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23335 31

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|  |                                            |           |
|--|--------------------------------------------|-----------|
|  | Deduct half for T. F.,                     | 11667 65½ |
|  | Cr. by 70 per cent. rec'd on 29 shares, is | 8120 00   |

---

Balance due 1st June, 1812, to T. Fowler from Russell

|           |           |          |
|-----------|-----------|----------|
| Attwater, | - - - - - | 3547 65½ |
|-----------|-----------|----------|

THEOD. FOWLER.

The plaintiff then offered the depositions of Joseph Roberts, cashier for the trustees of the late Bank of the United States, and of W. M. Walmsley, a broker residing in Philadelphia, for the purpose of proving, that certain dividends on the shares of the stock of said bank had been declared, and that the defendant received the amount paid on the 29 shares mentioned in said letter, over and above the 70 per cent. credited in the account.

These depositions were objected to by the counsel for the defendant as inadmissible: and if admissible, as insufficient to establish the facts, which the plaintiff sought to prove by them.

The objections were overruled by the presiding judge, and the point reserved for the consideration of the whole court. But as the decision of the case did not turn upon these depositions, and as the court gave no opinion, either upon their sufficiency or admissibility, it has not been deemed necessary to notice them

further. The plaintiff also called a witness to corroborate the facts stated in the depositions, and the testimony offered by him tended to prove that the defendant had received all the dividends declared on the 29 shares of stock mentioned in his letter.

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The defendant then moved for a non-suit, upon two grounds: first, that this action could not be maintained by the plaintiff: secondly, that the proof offered was not sufficient to show that money had been received by the defendant. This motion was denied by the presiding judge, in order that the facts of the case being established, the questions of law might be reserved for the consideration of the whole court.

The counsel for the defendant then read in evidence two letters from the plaintiff to the defendant, for the purpose of showing that the *joint* transactions between the parties, relative to the stocks mentioned in the foregoing agreement, had *never been liquidated or closed*. Those parts of the correspondence which bear upon this point, were as follows:

"New-York, June 2d, 1825.

"*Theodocius Fowler, Esq.*

"DEAR SIR,"

"By the conversation I had with you the other day, it appeared, that the business which was done by us, under the contract entered into on the 28th March, 1812, was not within your recollection, and as it may not be convenient to you to look up your papers referring to it, I have transcribed from those I have, such parts of them as will show you how the business is situated.

"Agreeable to the contract, I subscribed for two hundred shares in the bank of America, amounting to \$20,000, which money I borrowed of Messrs. Prime, Ward & Sands, for one year; at the end of which time I borrowed the same sum of the bank of America, and gave them my bond, with a pledge of the stock, and paid Messrs. P., W. & S., with the interest, which was seven hundred dollars more than the dividend for that year. Since then, the bank kept the dividends on the stock, until July, 1823, when they agreed to take the stock, give me up my

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"bond, and discharge me." "The above is a statement of my  
"part of the business, by which I have paid out seven hundred  
"dollars about eleven years ago, and you have received on my  
"29 shares, Sept. 12, 1812, eighteen per cent. : April 1st, 1813,  
"seven per cent. : April 1815, five per cent. : in 1817, four per  
"cent : 1820, one and three quarters per cent. , and in 1823, two  
"and one quarter per cent, which overpays you for the money  
"advanced, namely, \$3,547 66, and the interest.

"After having examined into this business, you will please to  
"let me know how you are disposed to settle it.

(Signed)

RUSSEL ATTWATER.

New-York, June 4. 1825.

Mr. Theod. Fowler,

"Sir"

"Yours of this day I have received. However absurd or  
"laughable it may appear to you that *I should request a settlement*  
"of a business commenced in 1812, and not finished even at this  
"time, is of no consequence to me. If I had not considered my  
"claim legal as well as equitable, I might not thought it worth  
"my trouble to call upon you for a settlement ; but as it possesses  
"both, not only in my opinion, but of a gentleman well acquaint-  
"ed with such transactions, (and the only one who has a know-  
"ledge of it,) I might perhaps think of relinquishing it: as it is,  
"you may be assured I shall not, but leave it for the public to  
"judge, whether it is most honourable for you to refuse a settle-  
"ment, or me to ask for one. *I have good reason to believe that*  
"you knew that I subscribed for the bank stock ; and by our contract  
"it was not contemplated that I should advance any money  
"for the shares you purchased. You will understand by this, that  
"I am not so modest a man as to *desist from claiming my rights,*  
"and if you should not change your mind, and let me hear again  
"from you on this business, I must take some other course to  
"bring it to a close : but if you should be disposed to submit it  
"to any judicious and well-informed gentleman in business, I  
"should be pleased to abide by his opinion.

"I shall leave town to-morrow morning for Connecticut, on  
"business, and I expect to be absent four or five days. On my

"return I should be pleased to have it settled, if it is to be, amicably. That will depend on yourself.

I am yours, &c.

(Signed)

"RUSSELL ATWATER."

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Upon this evidence, a verdict was taken for the plaintiff for \$877, subject to the opinion of the court, upon a case to be made, containing the foregoing facts. If the court should be of opinion, that the action could not be maintained, a judgment of non-suit was to be entered. If the action was adjudged maintainable, and the evidence sufficient, then the verdict was to stand. If the court were of opinion that the action could be maintained, but that the evidence of the plaintiff was inadmissible, or insufficient, a new trial was to be granted.

The cause was argued by *Mr. T. L. Ogden* and *D. B. Ogden*, for the plaintiff, and by *Mr. Tallcott* and *Mr. Jay* for the defendant.

JONES, C. J., after stating the facts of the case, delivered the opinion of the court, as follows :

The objection taken by the defendant to a recovery in this cause, is, that the action is by one partner against another, in a partnership transaction, and therefore is not sustainable. The plaintiff insists that the letter of June 26th, 1812, from the plaintiff to the defendant, and his acquiescence in its contents, were evidence of the mutual consent and agreement of the parties to terminate and close the joint concern, or if the contract was left open, and operations under it were merely suspended, the letter was conclusive evidence of the division by the defendant himself of the 58 shares of United States Bank stock, and a severance of the joint interest therein, and an allotment of the 29 shares to the plaintiff for his separate share, and that the plaintiff, by his silence, acquiesced in the arrangement and consented to the partition. It is also insisted, that the defendant by this operation became the trustee for the plaintiff of the 29 shares so allotted to him, but retained the same as security for the balance due from

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the plaintiff, and has received the dividends under them, insatisfaction of that balance. In corroboration of this idea, it was shown by extracts from the books of the trustees of the stockholders of the bank, that Fowler, the defendant, in May, 1812, had standing in his name 44 shares; and that on 28th September a separate power of attorney was given to receipt for twenty-nine of these shares; thus indicating, that a division had been made of the stock, and that from that time, those 29 shares were kept separate from the rest of the stock, and that it continued in his hands unsold, while the residue appears to have been wholly disposed of by him. These facts would seem to manifest an intention, on his part, to sever the common interest in the stock, and to vest in the plaintiff exclusively the 29 shares mentioned in the letter of June 26th, 1812, as being his share of the stock and he entitled to receive the residue of the dividends thereon.

The defendant denies that these acts amount to a severance of the joint interest, and insists upon the principle, that there must be a liquidated settlement of the co-partnership accounts, and a balance struck, or a balance agreed upon by the partners to entitle the one to sue the other at law; he insists, that no such liquidation and settlement appear in this case, and he puts in evidence two letters of the plaintiff, of as late a date as 1825, to show that he then claimed an account upon the principles of a continuance of the partnership. I do not attach much importance to these letters. They admit, I think, of the explanation given of them by the plaintiff's counsel, and at any rate, they speak after too long an interval of time to be heard with any effect; and though used against the writer, yet I think the claim they prefer, which by the last letter appears to have been repelled, was one which could not be sustained. I cannot consider those letters as any evidence of the continuance of the joint concern; and the conduct of the parties shows that they considered it as terminating in 1812. The two hundred shares of stock in the bank of America, subscribed for by the plaintiff, were never considered or treated as joint stock. It was managed by the plaintiff solely. It was nursed by his care; and finally wound up, the stock sold out, and the operation closed by his agency alone, and without any con-



sultation or advice of the defendant. The subscription was never made known to him, and he was an utter stranger to it, and to the disposition made of it, until 1825, two years after it was finally closed.

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But the difficulty the plaintiff has, in my judgment to encounter is, that his own testimony fails to prove such separation of his joint interest with the defendant in the United States Bank shares, as to enable him to maintain an action at law against the defendant for the avails of the 29 shares, as his exclusive property. If his long silence and passive conduct are not evidence of an abandonment of the contract, his remedy in equity for an account is clear. But in an action of assumpsit at law, he must show more than a right to an account; he must show an actual account, or a division of the stock, or an adjustment and promise to pay. Does the testimony in this case establish either? The whole of the joint stock was purchased by the defendant, and the purchase money advanced by him. The times made it necessary, or highly expedient, in his judgment, to terminate the connection, or, at least; to suspend its operation. He knew of no purchases of stock in the Bank of America, and under these impressions and with these lights, the letter of June 26th, was written. It transmitted an account of the defendant's operation on joint account up to the period of that statement, and the amount then due to the defendant for the plaintiff's half of the defendant's advances to effect the purchases, after crediting the 70 per cent. received in dividends. This sum, as no further purchases were intended to be made, the plaintiff was bound to pay for his share of the stock, and he would, of course, be entitled to the residue of the dividends on 29 shares, or one half of the stock. This may have been virtually a discontinuance or dissolution of the co-partnership, but it was not an adjustment of the partnership concerns.

In *Casey and Lawrence v. Brush*, [3 Caines' R. 293.] the court held, that to entitle the plaintiff to recover in an action for the balance of an account growing out of a partnership dealing or transaction, there must be evidence of an express promise to pay the balance.

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The case of *Wetmore v. Baker*, [9 John. R. 307.] was decided on the ground that there was no such partnership between the parties as to obstruct the action.

In *Murray v. Bogert & Kneeland*, [14 John. R. 318.] the plaintiff, and defendants and others had been jointly concerned in shipments and adventures which had all terminated, and been closed. The supercargo of one of the vessels sued the plaintiff and three others, for advances made by him, and expenses incurred on their account, and recovered a judgment against them, which they were compelled to pay, and the plaintiff then brought a suit against the defendants to recover the proportion due from them of what had been paid by the plaintiff. It was objected, that the demand grew out of a partnership transaction, and was not recoverable in an action at law; and the court held, that there was nothing in the case showing a settlement of the co-partnership accounts, and balance struck, and a promise by the defendants to pay, so as to enable the plaintiff to sustain the action.

In *Halsted v. Wiggins*, [17 John. Rep. 80.] the court ruled the objection, that the demand arose out of partnership concerns to be conclusive, unless there had been a liquidation of the demand. In this case there has been no liquidation or settlement, nor any account stated between the parties; and unless the ground is tenable, that the joint interest in the stock was severed, and the share of each party allotted and assigned to him in severalty, the plaintiff must fail in his suit.

The features of the case which have the appearance of an actual division of the stock, are the advice to the plaintiff that he would be entitled to receive the future dividends on 29 shares, and the fact of the separation of that number of shares from the whole quantity, and keeping them in a distinct parcel. But these were the acts of the defendant solely. He could not sever the joint interest in the 58 shares, so as to vest a separate property in himself in the shares taken by him. Suppose the portion of the stock reserved for himself had been sold by him, and the price of stock had afterwards fallen, would he not be accountable for the plaintiff's share of what was sold? the apportionment could not bind

the plaintiff, and the only purpose of the separation of the 29 shares from the residue, which could be useful, was the precaution of always keeping that quantity ready for the plaintiff, in case he should accede to the proposals of the letter of the 26th of June, 1812, and come to a settlement with the defendant, pay up the balance due from him, and take his part of the joint stock.

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But it is said, that by his silence he acquiesced in these proposals, and must be considered as acceding to the severance of the stock, whereby the defendant became his trustee of the 29 shares set apart for him.

He received that letter, and did not answer it. But did he thereby agree to the defendant's terms of settlement? Those terms were, that the plaintiff should forthwith pay the balance due from him, and make a final settlement of the joint concern. The defendant presses him for payment, and invites him to a settlement; but there were acts yet to be done; neither of which was done, nor was any step taken by the plaintiff for the purpose of informing the defendant of his intention to accede to the arrangement, and perform his part of it. The allotment of the 29 shares to him, if such allotment can be considered as made, was provisional, and to take effect on his compliance with the terms of settlement, and finally winding up the concern. This he never did do. Could he then lie by, and by his silence accept or affirm the terms of the arrangements proposed by the defendant, which were favourable to him, and leave those unperformed which were inconvenient or unfavourable to him? could he leave unpaid the balance he owed, and keep aloof from the final settlement to which he was pressed, and by which he would entitle himself to the shares, and yet insist on the severance of the shares as absolute, and charge the defendant against his will as trustee of those shares for him, and impose on that partner the duty of receiving the dividends, and attending to the concerns which the ownership of those shares imposed, without compensation? In my judgment he was bound to answer fully the terms of that letter, or he could claim no benefit from any part of it. But we may ascertain the effect of his letter by another test: Could the defendant have sued the plaintiff for the balance stated in that letter to be due to him from

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the plaintiff? By the contract the defendant had a right to charge interest upon his advances, but he could not call for payment of the principal, until the joint operation was wound up, and the profit and loss account was settled unless the joint interest was severed and the account settled and stated between them. Then, if he had sued for that balance, would not the answer have been, that he must first exhaust the joint funds, and could claim the deficiency and balance only of his advances and interest, which the avails of those funds failed to reimburse and satisfy? Would it be any answer to this defence, that the defendant, had severed the joint interest by his own act and set apart the plaintiff's portion of stock for him? The plaintiff could not be concluded by that act, unless he affirmed it, and accepted the stock; his silence could not amount to an acceptance; he was entitled to stand upon his rights as they were; and leave the defendant to wind up the joint concern, which was under his charge for the joint benefit. In taking that stand, he secured himself from the call of the defendant for his proportion of the advances, and remained liable for the moiety of the final balance only, if there should be any. I interpret his silence to mean, that such was the course he determined to take, and the result was, what if well advised, he knew it must be. The defendant could not insist upon payment; the only obligation the defendant was under to him, resulted from the contract; and by that contract he was not bound to pay the advance.

The whole concern is now closed, and the joint operation has resulted in a gain. The moiety of this gain belongs to the plaintiff. But it is the fruit of a joint or co-partnership operation, and an action at law will not lie by the plaintiff against his former partner for it. There must, therefore, be a judgment of non-suit.

*Judgment of non-suit.*

[Ogden and Huggins, attys. for plff. P. A. Jay, atty. for def't.]

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF  
ALL SAINTS CHURCH IN THE CITY OF NEW-YORK

versus

GEORGE LOVETT.

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Where there has been a body corporate *de facto* for a considerable period of time, claiming at least to be such, and holding and enjoying property as a corporation, it will be presumed that every mere formal requisite to the due creation of the corporation has been complied with.

Where a person undertakes to enter into a contract with a corporation in their corporate name, and accepts an official appointment under them, he thereby admits them to be duly constituted a body politic and corporate under such name; and cannot afterwards set up, by way of defence, that no such corporation ever existed, but is concluded by his admission.

Where the trustees of a religious incorporation, bring a suit *colore officii*, the defendant cannot object to their right of recovery, upon the ground that they are not trustees, without showing that proceedings have been instituted against them by the government, and carried on to a judgment of *ouster*. Being trustees *de facto*, all their proceedings are valid, until they are ousted by a judgment at the suit of the people, and no advantage can be taken of any *non-user* or *mis-user*, on the part of the corporation, by any defendant in any collateral action.

**ASSUMPSIT** for money had and received. Plea, the general issue, and payment, with a notice of set-off.

This cause was tried before *Mr. Justice Oakley*.

At the trial, the plaintiffs produced a certificate of incorporation, bearing date the 17th day of May, 1824, which recited, that in pursuance of notice given, the male persons of full age, belonging to the church, congregation or society in the city of New-York, in which divine service is celebrated according to the rites of the protestant episcopal church, met at the house of the Rector, the Rev. William A. Clarke, for the purpose of incorporating themselves under the act entitled "an act to provide for the incorporation of Religious Societies," "and the act to amend the same." That at said meeting George Dominick was called to the chair, and presided: that certain persons, therein named, were appointed vestrymen, and the name by which the said church, congregation or society, should be known in law, was agreed upon and fixed. This certificate was

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regularly subscribed and sworn to, before the first Judge of the Common Pleas, in the city and county of New-York, and duly recorded in the office of the Register thereof.

The plaintiffs then produced their book of minutes, and called their secretary as a witness, who testified, that by a resolution passed by the plaintiffs in April, 1825, the defendant was appointed their treasurer, and acted as such, until the spring of the year 1827: that the proceeds of certain property belonging to the plaintiffs had passed into the hands of the defendant, who had acknowledged to the witness, that the balance of such proceeds remaining in his hands was \$807, 70. The witness further testified, that on the 21st day of April, 1827, Joseph F. Perry was appointed treasurer in place of the defendant. The plaintiffs then proved, that notice had been given to the defendant to deliver over to the new treasurer all the property belonging to the plaintiffs in his hands; but that he had declined, upon the ground that the election of wardens and vestrymen, who had made the new appointment, was illegal and void.

The plaintiffs here rested their cause; whereupon the counsel for the defendant moved for a non-suit, upon the ground that the plaintiffs had not shown themselves entitled to maintain this action. The motion was overruled by the presiding judge, whose opinion was excepted to by the defendant.

The counsel for the defendant then offered to prove, that the church in question was originally established as a *free church*, and that its funds were subscribed with the express understanding, that the establishment should forever remain as a *free* Episcopal Church. That the certificate of incorporation was drawn by the said Rector, who having omitted to insert a clause stating that said church was to remain free, had promised, upon objections made by the vestry, that the omission should be supplied by a resolution, which was passed on the 10th of June, 1824, and stated that the pews of said church, when erected, should forever be free. That for the purpose of inducing persons to subscribe, a printed paper, headed "plan for a *free church*," bearing signatures of the bishop and other clergy, was circulated; together with another of a like kind, drawn up by the said Rector, that

the original vestry were warmly in favour of the plan of a free church, and that the said rector, although professing to entertain the same sentiments, was secretly actuated by the fraudulent purpose of appropriating the funds raised, to the different object of a church upon the ordinary plan. That the said rector fraudulently avoided the meetings of the vestry, where his presence was indispensable for a period of more than seven months : that during said period, while the functions of the vestry were suspended, the said rector fraudulently endeavoured to qualify a number of persons having no interest in said church, to become voters at the next election : that in the month of April, 1827, the last-mentioned election was held, at which the said rector presided, and that he, notwithstanding the remonstrances of those who had contributed their funds, received the votes of persons having no interest in said church, for wardens and a vestry, according to a printed list, which he had prepared and circulated, whereby he procured the former wardens and vestry to be removed, although a large majority of the legal voters were in favour of their re-election. That several of the newly-elected wardens and vestry had refused to accept their appointments, but the remainder, with said rector, *claiming to be the corporation*, had erected a new church, in which the pews were not free, but had been sold to the highest bidder. That all the property of the corporation which could be obtained by the new wardens and vestry had been used to defray the expenses of erecting said last-mentioned church, and the funds now in the hands of the defendant, if recovered, were to be devoted to the same object. That the whole of said proceedings were fraudulent, illegal and void ; that the defendant had never been legally removed from his office, and that the resolution appointing his successor was not a resolution of the corporation, and that no legal demand had ever been made upon the defendant for the money in his hands in behalf of the *corporation*.

These several matters were ruled by the presiding judge to be inadmissible as a defence to this action, and the jury thereupon found a verdict for the plaintiff.

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*Mr. Roosevelt* for the defendant, now moved for a new trial, and contended,

I. That the evidence produced on the part of the plaintiffs was not sufficient to entitle them to a verdict. On the plea of the general issue, the plaintiffs must prove themselves to be a corporation to be non-suited. [*Hartford Bank v. Murrel*, 1 *Wend. R.* 87. 19 *John. R.* 300. 14 *John. R.* 416.] In this case, the principal, if not the only proof produced by the plaintiffs upon this point, was the certificate of incorporation. This certificate having been filed and recorded under the provisions of the act under which the plaintiffs exist as a corporation, if they have any legal existence, [2 *R. L.* 112.] must be conformable to its requirements, or it will not be evidence to support the issue.

By this act it is expressly provided, that at the first meeting of the vestry, the rector, or if there be none, *or he be necessarily absent*, then one of the church wardens or vestrymen, or any "other person called to the chair, shall preside at the first election." And it is also further provided, [5 *Vol. L.* 34. a.] that he, "together with two other persons, shall make certificate," &c.

Now, from the certificate before the court, it appears that the rector *did not* preside at the first meeting of the vestry: but *why* he did not, is not shown. It does not even appear that he was absent; and from any thing disclosed by the certificate, he might have been present at the meeting, without presiding. If he was absent, then that certificate should have stated, that he was *necessarily* so, and have assigned that as a reason why another person was called to the chair. The certificate, so far from showing that the requirements of the act have been complied with, proves that they have been neglected: it cannot, therefore, be used as any evidence to prove the existence of the plaintiffs as a corporation. Upon this point, therefore, the plaintiffs are without proof, and should have been non-suited at the trial. [1 *Kyd.* 451.]

II. The plaintiffs, before they could bring this action, were bound to make a *legal demand*. [*Utica Bank v. Van Gieson*, 18 *John. R.* 486. 9 *J. R.* 361.] In order to do this, they must show an authority to make such demand; and whether they had



or not, depends entirely upon the validity of the election of the wardens and vestry which removed the defendant and appointed his successor. The evidence offered on the part of the defendant, as to this point, or some part of it at least, ought to have been admitted.

This evidence would certainly have established the fact, that the last election was fraudulent and illegal. That all the objects for which the subscriptions were first obtained were perverted, and a church finally established which was the very opposite of the one intended by those who contributed their money. If the election was illegal, then the defendant has never been removed from office, no legal demand has been made upon him, and he has a right to retain the money in his hands, as trustee, for those who gave it, and who wish him to retain it.

The question in this case is not as to who are the trustees *de facto*, but who are the trustees *de jure*. Those who claim the money, must prove a right to demand it; and if their official stations have been obtained by fraud, they have no legal existence, and cannot have any legal or moral rights. In the case of the *People v. Runkle*. [8 *John. R.* 363.] (which was a contest between two sets of trustees,) it was expressly decided, that the only question was, as to who were the *legal* parties, not who were trustees *de facto*. A new trial was granted on that ground, and the question finally settled in favour of the old trustees.

The question of a dissolution by surrender, or by acts, which in judgment of law amount to a surrender, may be tried in a civil suit without a *quo warranto*. And if a corporation suffers acts to be done, which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. *Slee v. Bloom*, [19 *John.* 456.] The defendant also offered to prove, that the persons by whose votes the present vestry were elected, were not qualified to vote at all; and that such votes were fraudulently procured by the rector. This evidence, also, should have been admitted, because these illegal votes, of themselves, avoided the election. [2 *Kyd*, 7, 8.]

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*Mr. Beverly Robinson*, for the plaintiffs, contended,

I. That the defendant had no right to question the legal existence of the corporation, having himself admitted that, by accepting and holding an office under the plaintiffs. If the question could be gone into by the defendant, there is enough before the court, to enable them to infer that all the requirements of law have been complied with. After the plaintiffs have been exercising their rights as a corporation, for years; after having filed and recorded a certificate, to which no objection was made by any of the parties in interest, it would be a stretch of nicety to say, that it was the presumption of law, that the provisions of the act had been violated, by the omission of a fact in the certificate which was in no way material. It is admitted, that if the rector were necessarily absent, at the first election of the vestry, then another person might preside.

We find by the certificate, that a person other than the rector did preside, and the natural inference is, that the rector was necessarily absent. But whether that be so or not, cannot be inquired into by the defendant, because he has, by his own acts, expressly admitted that the plaintiffs are duly incorporated. He is estopped to deny what he has expressly admitted: his own acts are conclusive upon him. [14 *John. R.* 238. 1 *Phil. Ec.* 171.]

II. The plaintiffs had a perfect right to make the demand, because the trustees chosen in 1827, became such *de facto*, let their legal existence be what it might. The evidence offered by the defendants was clearly inadmissible in this collateral action, even if it had been true. The plaintiffs had no objection to join issue upon the facts offered to be proved, if the inquiry could have led to any profitable result. But if the defendant wished to question the validity of the election, he should have done it by a proper course of proceeding, which would have put that matter directly in issue. It is an established principle, that any *misuser* or *non-user*, amounting even to ad dissolution of the corporation, cannot be set up by way of defence to an action by such corporation.

The defendant personally is not permitted to question the validity of the proceedings of those who are trustees in fact, as

great inconvenience and embarrassment would ensue, if those questions were constantly to be agitated by every person who might chance to come in collision with the corporation.

The evidence, therefore, was rightfully rejected. [6 Cow. R. 27. *Trustees of Vernon Soc. v. Hills.*]

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OAKLEY, J. This was an action of assumpsit for money had and received. The defendant was treasurer of the church, and as such received the proceeds of certain lands which belonged to the church, and which were sold during the time he acted as treasurer. In 1827, a new treasurer was appointed, and the defendant refused to pay over to him the balance of moneys remaining in his hands. This action was brought to recover such balance.

The first objection to the plaintiffs' right of recovery is, that the certificate of their incorporation is defective, and that they do not show themselves to have been duly created a body corporate, and entitled to sue as such.

By the act authorizing the incorporation of protestant episcopal churches [2 R. L. 112.] it is provided, that at the first election of a vestry, the rector, or if there be none, *or he be necessarily absent*, one of the wardens or other person shall preside, and shall unite in the certificate to be filed under the act. By the certificate produced by the plaintiffs it appears, that the rector did not preside at the first election; nor did it appear by the certificate or by any other evidence, that he was necessarily absent. The defendant contends, that the requisitions of the act were not complied with, and that the plaintiffs never became a corporate body.

The certificate of incorporation is dated on the 27th of May, 1824. From that period to the present, the whole case shows that there has been a body corporate, *de facto* at least, claiming to be a church, and holding and enjoying property as such. After such a lapse of time I am of opinion that it ought to be presumed, that every formal requisite to the due creation of the corporation was complied with. The presence or absence of the rector at the first election of a vestry was a very immaterial cir-

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cumstance ; and as the law does not prescribe, that the fact of his absence shall be stated in the certificate, it will be intended if necessary to give validity to the incorporation.

I am of opinion, also, that the defendant cannot be permitted to allege that the original incorporation of the church was invalid, or irregular. In the case of *the Dutchess Cotton Manufactory v. Davis*, [14 Johns. 238.] the Supreme Court held, that where the defendant undertakes to enter into a contract with the plaintiff in their corporate name, he thereby admits them to be duly constituted a body politic and corporate under such name. In the present case the defendant accepted from the plaintiffs, acting as a corporation, the appointment of treasurer ; he acted several years under such appointment, and obtained possession of the money of the plaintiffs, now in his hands, by virtue of the official station he held under them. It would be a violation of all common sense and justice to permit him now to set up, that no corporation ever existed. I consider the defendant as coming fairly within the principle laid down by the Supreme Court in the above-mentioned case. He has, in the most formal manner, recognized and admitted the existence of the body corporate, and must now be concluded by such admission.

II. The defendant contended, that the defence set up by him at the time was improperly excluded. He offered to prove, in substance, that the church in question was originally established as a free church : that the rector by various fraudulent and illegal claims defeated that object, and particularly, that the election of the vestry in 1827, (by which he was removed from the office of treasurer, and a new one appointed,) was illegal and fraudulent. The judge held this defence to be inadmissible.

In the case of the *Trustees of Vernon Society v. Hills* [ 6 Cowen's R. 23.] the Supreme Court have expressly decided, that when the plaintiffs have acted as trustees of a religious incorporation, and have brought a suit *colore officii*, the defendant cannot sustain an objection to their right of recovery, on the ground that they are not trustees, without showing, that proceedings have been instituted against them by the government, and carried on to a judgment of ouster. The doctrine of the case is,

that being trustees *de facto*, all their proceedings are valid, till they are ousted by a judgment at the suit of the people, and that no advantage can be taken of any *non-user* or *mis-user* on the part of the corporation by any defendant, in any collateral action.

In the present instance it appears, from the proof in the case, and from that offered by the defendant that the vestry chosen in 1827 became trustees of the church "*de facto*:" That they acted as such: that they removed the defendant from his office as treasurer, and appointed a successor, and that they took possession of the temporalities of the church claiming to be the corporation. This suit, then, is clearly brought by them *colore officii*, and the character in which they sue cannot be questioned on the ground of any illegality in their election. The case in the 6th of Cowen's R. seems to be conclusive on the subject.

It was a part of the defence offered, that several of the vestry elected in 1827, refused to accept their appointment. This offer was clearly not broad enough, if under many circumstances the refusal by those elected to act, could have been taken advantage of by the defendant. It is clear, that nothing short of the refusal of a *majority* to take upon themselves the character of trustees could, in any event, have affected the right of those newly elected to represent the corporate body.

I am, on the whole, clearly of opinion, that the defence offered was rightly rejected, and that the motion for a new trial must be denied.

*Motion to set aside the non-suit denied.*

[B. Robinson, atty. for the plff. J. J. Roosevelt, atty. for the defn.]

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The affidavit of a party to a suit, made in the progress of the cause, for the purpose of resisting a proceeding on the part of his antagonist, cannot be excluded by counter affidavits, setting forth, that the party making the affidavit is an atheist. The competency of a witness cannot be attacked in this collateral way, as he has no opportunity for explanation or reply. But where a party has been induced to make an application to the Court by the incorrect declarations of the opposite party, the Court, although they may refuse the application, will compel the party in fault to pay the costs of the application.

THIS was an application on the part of the defendant to compel the plaintiff to give security for costs, upon the ground, that he was a non-resident. The plaintiff, in reply, put in an affidavit stating his residence to be in the city of New-York. The defendant then read affidavits to show that the plaintiff was an atheist, and had no belief in a superintending Providence, or a state of future rewards and punishments. Upon these affidavits, the defendant insisted, that the plaintiff was not competent to testify or make an affidavit, and that the case was therefore to be considered as if his affidavit were not in the question.

*Per Curiam.* The competency of a witness to testify, or of a party to make an affidavit, cannot be attacked in this collateral way. He has no opportunity for reply or explanation. It may be, that the plaintiff can so explain his views upon the subject of his belief, as to bring himself within the rules of law, and his affidavit cannot be excluded in this manner, nor he himself be thus attacked. The motion must be denied.

The defendant then shewed, that he had been led to make the application by the plaintiff's own declarations, he having asserted that his residence was in the kingdom of Spain, and not in New-York. The Court were still of opinion, that the motion must be denied, but decided that the plaintiff should pay the costs of the application, as he had, by his own declarations, induced the defendant to make it.

*Motion denied, but the plaintiff to pay costs.*

[F. B. Cutting, atty. for the plff. A. Williams, atty. for the def't.]

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In every action upon a special agreement, the declaration must set forth a sufficient consideration; and any material variance in the proof of the consideration will be fatal to the plaintiff's recovery.

The plaintiff declared, upon a special agreement of the defendant, to guaranty the payment of certain promissory notes made by one Scovell in favor of the plaintiff, in consideration of a sale and delivery of goods by him to Scovell.

At the trial, the plaintiff introduced the special agreement in evidence. This agreement recited the notes of Scovell, which purported to be *for value received*, but contained no consideration for the *defendant's* promise, except such as might be *inferred* from the words "*value received*" used in the notes, and no other evidence of a consideration was offered. Upon demurrer to this evidence, it was *HELD* that the proof did not meet the declaration: but as it was competent for the plaintiff to support the action by parol proof, that the sale of the goods and delivery of the agreement were concurrent acts, the court awarded a *verdict de novo*, to give the plaintiff an opportunity of proving all the facts of his case.

This cause came before the court on a demurrer to the plaintiff's evidence.

The declaration contained two counts. The first set forth that the defendant, on the 5th day of December, 1827, in consideration that the plaintiff would sell and deliver to one Noah Scovell a quantity of merchandise, promised to guaranty to the plaintiff, or his order, the payment of three promissory notes, made by Scovell, in favour of the plaintiff, bearing date on the day and year aforesaid, and payable, the first in seven, the second in nine, and the third in twelve months after date.

This count then alleged a sale and delivery of the goods to Scovell, the taking of the notes in payment, and concluded by an averment, that the first note having become due, had not been paid by Scovell, nor the payment thereof guarantied to the plaintiff by the defendant.

The second count set forth the guaranty of the *first* note as in the preceding count, and averred that the note having become due, had not been paid by the defendant, nor the payment thereof guarantied to the plaintiff by him, although requested, &c.

The defendant pleaded the general issue.

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At the trial, the plaintiff produced in evidence the last-mentioned note, unpaid, and an agreement in writing, executed by the defendant, in the following words :

" New-York, Dec. 5th, 1827.

" Whereas Noah Scovell, of the city of New-York, *has this day passed* to John Wheelwright, of the said city, his three promissory notes, of which the following are correct copies, viz :

" New-York, Dec. 5th, 1827.

" Dolls. 3,530 27-100

" Seven months after date I promise to pay to the order of  
" Mr. John Wheelwright three thousand five hundred and thirty  
" 27-100 dollars *for value received.* N. SCOVELL."

" New-York, Dec. 5th, 1827.

" Dolls. 3530 26-100

" Nine months after date I promise to pay to the order of  
" Mr. John Wheelwright, three thousand five hundred and thirty  
" 26-100 dollars for value received. N. SCOVELL."

New-York, Dec. 5th, 1827.

" Dolls. 3,530 27-100

" Twelve months after date I promise to pay to the order of  
" Mr. John Wheelwright, three thousand five hundred and thirty  
" 27-100 dollars, for value received. N. SCOVELL."

" Amounting together to ten thousand five hundred and ninety  
" 80-100 dollars : now, in pursuance of the understanding and  
" agreement between the said John Wheelwright and the said  
" Noah Scovell, I do hereby guaranty the just and full payment  
" of the said notes to the said John Wheelwright, or his order ;  
" and should any default of payment thereof be made by the said  
" Scovell, I bind myself for the full amount of such default,"

JNO. A. MOORE."



After the introduction of this proof, the plaintiff rested his cause, and the defendant thereupon demurred to the evidence. Oct. Term,  
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And now, *Mr. J. Anthon* for the defendant, contended, that the proof offered at the trial was not sufficient to support the action. It appeared, (he said) from the evidence, that the notes of Scovell were delivered to Wheelwright before the guaranty was signed by the defendant. This constituted a separate and complete contract between the plaintiff and Scovell, before the defendant had any connexion with it; thereby making the defendant's undertaking decidedly *collateral*. It was a guaranty of a previously subsisting debt: the promise, therefore, required a distinct consideration to support it, and *that*, also, should have been expressed in the memorandum. [*Fell on Mer. Guar. p. 1—15, p. 20—25. p. 37. 2 Term R. 80.*]

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The declaration sets forth a collateral undertaking on the part of the defendant, and the evidence must support the promise stated. The agreement, therefore, must be considered as collateral, or it will not support the declaration; and if collateral, it is void, no consideration being expressed in the writing. [*5 East, 10. 4 Barn. & Ald. 595. 3 Bing. 107. 6 Moore, 86.*]

II. A guaranty, without a consideration expressed upon the face of it, is considered good in those cases only, where the original and collateral engagements are simultaneous, and are *both original* undertakings. [*8 John. R. 29. 11 John. R. 221. 18 John. R. 175. 3 John. R. 210. 4 Ib. 281. 5 Mass. R. 362.*] In all these cases, the declarations counted upon an original undertaking on the part of the guarantor, and proof that the collateral engagement was simultaneous with the original undertaking, was considered as disclosing a sufficient consideration to support the promise. In the present case, if this be considered as an *original* undertaking, then it ought to have been *declared* on as *such*; but now, the *allegata and probata* do not comport with each other, and the demurrer is well taken.

III. The extent of the interval of time between the making of the original contract and the contract of guaranty, is of no con-

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sequence, whether one day or one year, the sole question being, whether the original contract was perfected between the original parties, by the delivery of the notes, before the contract of guaranty was signed. The consummation of the first contract before the making of the second, constitutes the latter *ipso facto* a collateral engagement, which is void, unless conformed to the statute. In this case, the written document, which forms the whole of the evidence, speaks of the notes as *having been passed* to the plaintiff by Scovell, showing thereby that the original transaction was at an end. It then sets forth as a consideration for the contract of guaranty, (which is written at the foot, not of the *original* notes, but of *copies*.) that it was pursuant to the understanding and agreement between Wheelwright and Scovell, which is no legal consideration whatever.

The contract of guaranty is therefore within the statute of frauds, and void.

IV. If the Court should be of opinion, that the demurrer is well taken, then the question arises, as to what judgment shall be entered thereon.

A demurrer to evidence admits the competency of the evidence, as well as the verity of it, but objects that it is insufficient to maintain the issue. The judgment is final, either for the plaintiff or the defendant; and the verdict, which is a conditional one, stands or falls with the judgment. [1 *Wash. Rep.* 360.]

A *venire de novo* is only awarded where the demurrer is so negligently framed that no judgment can be given upon it. [1 *Arch. Prac.* 186. 2 *Trials per Pais*, 577. 2 *H. Black.* 187. *Anthon's Nt. Pri.* p. 70. note.]

*Mr. Wilkes, contra*, for the plaintiff.

The plaintiff rests his case upon the principles established by the Supreme Court in the case of *Leonard v. Vredenburgk*, [8 *John. R.* 29.] The only objection made to the plaintiff's right of recovery, is founded upon the supposition that the defendant's contract is a collateral one, and void by the statute of frauds, for not disclosing a sufficient consideration upon the face of the guaranty. But the inference to be drawn from the evidence, is

not, that the original transaction was perfectly passed, when the guaranty was executed. On the contrary, the fair import of the expressions used is, that the guaranty was given in pursuance of a previous understanding of the parties, that it should make part of the transaction which led to the giving of the notes. The giving of the notes, and the execution of the guaranty, are to be considered as concurrent acts, and all part of one transaction. Upon a demurrer to evidence, any fact which the jury could infer from it, is admitted by the party demurring, and we think that a jury would say, from this evidence, that the guaranty was connected with the original transaction.

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II. The guaranty, then, being an essential branch of the same transaction, which caused the notes to be given, it needed no new or distinct consideration to pass between the plaintiff and defendant, but was supported by the same consideration which upheld the notes. The consideration of the notes was the consideration for the guaranty, and being one and the same transaction, the same consideration was sufficient to support both contracts. This is the very principle of *Leonard and Fredenburgh*, and it entirely covers this case.

III. But even if this were not so, still the plaintiff has shown a sufficient consideration upon the very face of his evidence. The notes purport to be given for "value received;" the contract recites the notes, and therefore admits "value received," as a consideration for the guaranty. The case from the 8th of *Johnson*, (29) supports this principle entirely, and embraces the present contract. The pleadings in this case are not drawn in controversy; for the plaintiff has declared according to the facts of his case. If the principles upon which he relies are correct, his pleadings must be correct also.

IV. But if the plaintiff be mistaken in this view of the evidence, the Court will not conclude his rights by pronouncing a definitive judgment upon the verdict. If he has failed to sustain his action, it is because the whole merits of the transaction are not

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disclosed by the proof: for it is evident, that the whole case must turn upon the fact, whether the giving of the notes and executing the guaranty were concurrent acts. If the plaintiff's evidence be defective in this particular, he can explain it by parol proof upon another trial:

In cases where *all* the proof is before the Court, and it is sufficient to sustain a judgment, in such cases, upon a demurrer to evidence, the judgment is conclusive, either for the plaintiff or the defendant. But where material facts are omitted, which can be supplied upon a further investigation, there the Court, for the purposes of justice, will award *a venire de novo*. [Doug. 119. 2 Hen. Bla. 187.]

OAKLEY, J. This case comes before the Court on a demurrer by the defendant to the plaintiff's evidence. The declaration sets forth, that the defendant, in consideration that the plaintiff, at his request, would sell to one *Scovell* a quantity of goods, promised the plaintiff to guaranty the payment of certain notes, made by the said *Scovell* to him. The notes are particularly set forth, and the plaintiff then avers, that he sold and delivered the goods to *Scovell*; that one of the notes had become due, and had not been paid: and that the defendant has refused to pay the same, or to guaranty the payment of it. The plea was non-assumpsit.

On the trial, the plaintiff offered in evidence, an instrument in writing, signed by the defendant, dated Dec. 5th, 1827.

This paper, after reciting that *Scovell had that day* passed to the plaintiff his three promissory notes, sets forth copies of the same, by which it appears that they severally bore date on the said 5th of December, and were expressed to be given for value received. The instrument then contains the following stipulation: "Now, *in pursuance of the understanding and agreement between the said John Wheelwright and the said Noah Scovell*, I do hereby guaranty the just and full payment of the said notes, to the said *John Wheelwright*, or his order, and should any default of payment thereof be made by the said *Scovell*, I bind myself for the full amount of such default."

The plaintiff also produced the first of the said notes, showing the same to be due and unpaid. To this evidence, the defendant demurred, and the question is, whether the evidence supports the cause of action as set forth in the declaration.

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The rule appears to be, that upon a demurrer to evidence, any fact which a jury could infer from it, is admitted. [*Corksedg v. Fanshaw*, Doug. 119.] Applying this rule to the present case, I think it might fairly be inferred, from the written instrument given in evidence by the plaintiff, that the guaranty of the defendant was a part of the original contract, on which the notes of Scovell were made. The guaranty is stated to be given in *pursuance of the agreement* between the plaintiff and Scovell, and although the recital in the instrument speaks of the notes of Scovell as having been already passed to the plaintiff, this language is not inconsistent with the idea that the making of the notes, and the giving of the guaranty, were, in substance, a simultaneous act, and both done in pursuance of the same understanding or agreement.

If this be the correct view of the transaction, it seems to follow, that the promise of the defendant, in the present case, was a part of the original contract between the plaintiff and Scovell, and may be supported by the same consideration. The law upon this subject was particularly considered by the S. C. in *Leonard v. Vredenburg*, (8 John. 29.) The guarantee of the defendant in that case was very similar to the present. It was there written on the original note. That circumstance seems to me to be of no importance, any further than it may be evidence of the fact, that it was a simultaneous act with the making of the note. It contained no other consideration than that expressed in the note, which was for value received. The plaintiff, on the trial, offered to show, by parol proof, what was the origin of the contract, and that the making of the note, and the giving of the guaranty, constituted one entire transaction.

The Court, in considering the case, say, that there are three classes of cases on this subject: one of which is, where "the guaranty is collateral, but is made at the same time with the

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"principal contract, and is an essential ground of the credit given to the principal debtor." In such a case, there need not be any other consideration, than that moving between the creditor and the original debtor; and it was expressly held, that the consideration imputed by the words "value received," contained in the note, applied to the guaranty, the whole being one entire contract. It was also expressly held, that "if there was no consideration, other than the original transaction, the plaintiff ought to have been permitted to show that fact by parol proof." And it was likewise held, that "if there was any doubt upon the face of the paper, whether the note and the guaranty were concurrent acts, and one and the same transaction, parol proof was admissible to show that fact."

The case of *Leonard v. Vredenburg* is a leading one on the subject, and has always given the rule, in this state, for the decision of like cases; [*Bailey v. Freeman*, 11 J. 221.] and the doctrine of it has been considered, by the Supreme Court of the United States [*D'Wolf v. Raubaud*, 1 Peters, 501.] as reasonable, and founded in good sense.

The present case, as far as it regards the sufficiency of the written memorandum of the agreement, to charge the defendant, falls, of my judgment, clearly within the principle laid down by the Supreme Court in *Leonard v. Vredenburg*; and if the transaction should appear, in evidence, to be as set forth in the declaration, I should think that the defendant would be bound by his contract of guaranty, though it might be considered, that no sufficient consideration was expressed in it; and that parol proof might be given, to show the original contract between the plaintiff and Scovell, and to connect the contract of guaranty with it, as constituting an entire agreement.

It is contended, however, by the defendant, that if the written memorandum, in this case, is sufficient to charge the defendant, it does not prove the particular contract set forth in the declaration; and that the plaintiff must fail in this action on the ground of the variance.

The rule on this subject is, that in every action on a special agreement, the declaration must set forth a sufficient considera-

tion ; [4 *John. Rep.* 283.] and it is well settled, that any material variance in the proof of the consideration, is fatal to the plaintiff's recovery. Every contract must be proved as laid.

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In the present case, the consideration alleged, is the sale and delivery of goods by the plaintiff to Scovell. There is no proof of any such consideration, unless it is to be inferred from the words "value received," contained in the copies of the notes set forth in the defendant's agreement. I think such an inference would be altogether too loose and uncertain. It was competent for the plaintiff to have sustained the declaration set up by him, by parol evidence ; and not having done so, he has failed to support his action as laid in his declaration, and cannot recover on the evidence as it now stands. When there is a demurrer to evidence, which is certain, as in the case of documentary proof, the practice is for the court to give final judgment, as on a special verdict ; but where there is no certainty in the statement of facts proved, the court may award a *venire de novo*. [1 *Arch. Prac.* 185, 6. 2 *H. B.* 209.] In the present instance it is evident, that the whole merits of the plaintiff's case have not been disclosed ; and I think, that it is competent for us, in the exercise of our discretion, to send the cause to another trial. The purposes of justice would not be subserved by giving a peremptory judgment on this record.

*Venire de novo awarded.*

[H. & E Wilkes, *Att'ys* for the *plff.* Edward Anthon, *Att'y* for the *def't.*

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JOHN ALDRIDGE *versus* PETER G. STUYVESANT.

An action lies in favour of a landlord, against any person, who so wrongfully and maliciously disturbs his tenants, that they abandon his premises, and the landlord thereby loses his rent.

The declaration in this case set forth, that the plaintiff was possessed of the unexpired term of a house, which he demised to certain persons, who entered, and were in the quiet possession of the same. That the defendant, knowing that they rightfully held possession as tenants of the the plaintiff, and wrongfully and maliciously intending to injure him, "so disturbed his said tenants" that they were obliged to abandon the premises: whereby the plaintiff lost his rent, and the premises became injured for the want of occupation.

Upon demurrer to this declaration it was held, that the plaintiff was entitled to judgment.

This was a special action on the case for disturbing the plaintiff's tenants.

The declaration contained three counts. The first set forth, that the plaintiff was possessed of an unexpired term of a house in the city of New-York, which he had rented to certain tenants for one year. That the tenants entered upon the premises, and were in the quiet possession thereof; when the defendant well knowing that they rightfully held and enjoyed the same as tenants, but contriving wrongfully and maliciously intending to injure the plaintiff, came to the premises and *threatened* the said tenants and their families, *that he would levy and seize their goods*. By means of which wrongful and malicious threats the defendant coerced said tenants to remove from the premises; thereby causing the plaintiff to lose his tenants, and the premises to remain vacant and unproductive for the space of eleven months: during all which time the plaintiff lost the rents and profits of said house and premises.

The second count set forth, the possession of the term by the plaintiff, and the letting of the premises to tenants, as in the first count. That the defendant, knowing that the premises were rightfully held and enjoyed by the tenants, but maliciously intending to injure the plaintiff, threatened said tenants, that he would levy and seize their goods, "*unless they would move out of*



said house and depart therefrom." By which threats the defendant caused the tenants to abandon the premises, whereby the plaintiff lost the rents, which he otherwise would have received from his said tenants, was unable to procure other tenants, and the premises "*became greatly dilapidated by reason of their untenanted state,*" &c.

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The third count stated the possession and letting of the premises, as in the preceding counts, and that the defendant contriving and wrongfully intending to injure the plaintiff, to deprive him of his tenants, and prevent the occupation of his house, "*so disturbed his said tenants,*" "that by the mere force of such disturbance, they were obliged by the defendant to abandon the premises. By means of which disturbance, the plaintiff lost his tenants, his rent, &c. and the premises became greatly injured for the want of occupation.

To this declaration, the defendant demurred generally.

*Mr. Jay*, for the defendant, and in support of the demurrer.

This is an action brought by a landlord against a stranger, for disturbing his tenant, and the question is, whether it can be sustained?

No precedent for such a case can be found and it is very doubtful whether the action can be supported by any principles of law. To lay the foundation of such an action, there must be "*damnum et injuria,*" and the only ground upon which it can be sustained in the present case, is the injury to the plaintiff arising from the loss of his tenants.

Now, the *tenants* could not have been *lost*, for the relation of landlord and tenant, existing between them and the plaintiff, could not be dissolved by the act of the defendant; but they continued to be *tenants* of the plaintiffs, as much, after leaving the premises as before. They remained liable upon their agreement after their departure, and the conduct of the defendant would have formed no defence to an action brought against the tenants by the plaintiff to recover the rent.

The only authority which has any bearing upon this subject, is in Rolle's Abridgment, (p. 108,) where it is said, that "if a man

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menace my tenants, by which they depart from their tenures, an action upon the case lies." Upon referring to the Year Book, [9 Hen. VII, p. 8.] it will be found that the tenants spoken of were tenants *at will*; and the injury to the plaintiff consisted, not in *threatening* the tenants, but in *causing them to depart from their tenures*. But that case cannot support the present, because the tenants here, being tenants for years, cannot "depart from their tenures:" they remain bound by their contract with the landlord, and he has a perfect remedy to enforce a performance of the contract.

II. The rent from the tenants to the plaintiff could not have been lost by any act of the defendant, because it was not *due* at the time of the disturbance, and there is no averment in the declaration, that the tenants were rendered unable to pay their rent. Neither is there any thing to show that the plaintiff could not have enforced his rights by distress. The action lies in favour of the *tenant*, rather than the landlord; for all the injury in the case falls upon the tenant, and the declaration alleges, that the wrong was done to him.

If the *reversion* were injured by the acts of the defendant, then the plaintiff might sustain an action; for the wrong, in that case, would be done to the landlord; but there, the injury comes merely by remote consequence, and if the action can be sustained, there may be a double satisfaction, or a double punishment rather, for the same injury. Extend the principle a little, and the consequences of sustaining this action will at once be perceived. Suppose a tenant puts his rent into his pocket, to carry it to his landlord, and on his way is met by his enemy, beaten, and so much injured, that the landlord is, by that means, for a long time kept out of his money: would an action lie in favour of the landlord against the wrong-doer, to recover damages for the remote injury received by him, in consequence of the immediate wrong done to the tenant? So in this case, the direct injury is done to the tenant, the remote consequences of which may fall upon the landlord; but there is no rule of law which can give damages to the landlord in an action like the present:

*Mr. Mulock, contra*, for the plaintiff.

It is a principle of our law, that for every wrong done to an individual, there are means of redress, and for every injury an appropriate remedy may be found. If the declaration in this case sets forth an injury done to the plaintiff by the defendant, it follows almost as a matter of necessary consequence, that the action is well founded in law.

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The declaration, in each of the counts, alleges a direct injury to the plaintiff, from the *wrongful and malicious* acts of the defendant. It states, as a matter of fact, that the injury complained of, has fallen upon the plaintiff, through the malice of the defendant, and the demurrer admits, that the facts are correctly stated. It is no excuse for the defendant, therefore, that the *tenants* may have acted precipitately or unwisely : it is enough, for the purposes of this action, that the wrong has been done. Even if the positions assumed by the counsel for the defendant were all of them correct, there is enough stated in this declaration to bring the plaintiff's claims within those principles ; for it is expressly averred, that in consequence of the defendant's unlawful interference, the tenants abandoned the premises, which became thereby "*greatly dilapidated, by reason of their untenanted state.*" If, therefore, the plaintiff had received all his rent from the tenants, his premises were injured by the wrongful interference of the defendant ; and it cannot be, that he can admit that fact by the pleadings, and also admit that he has acted maliciously, without giving a cause of action to the plaintiff.

But in this case, the wrong done to the plaintiff is of a more extensive character. It appears, as a matter of fact, before the court, in this stage of the cause, that the plaintiff, in consequence of the wrongful and malicious acts of the defendant, *has lost his rent*. It was not necessary to state the want of a distress ; for it being admitted that the rent is lost, the want of a distress will be inferred.

The case then comes down simply to this : the defendant admits that he has, by a wrongful and malicious disturbance, deprived the plaintiff of his tenants, whereby his rent is lost, and the

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premises are greatly injured. And yet, it is said, that the plaintiff is left by the law, without redress !

By what right can any man maliciously interfere between landlord and tenant, to the prejudice of either ? If there be a wrong, shall there not be a remedy ?

It is no objection to this action, that no express precedent can be found for its support. It is well founded in *principle*, and cannot be objected to in point of form. It rests upon the foundation which upholds this whole class of cases : that for every wrong there is redress, and for every injury, an appropriate remedy may be found. The injury here (if that were an objection) is not by remote consequence. It is immediate and direct ; it has fallen upon the plaintiff through the malice and wrong of the defendant, and the law will make him answerable for the consequences. [3 T. R. 51. 2 Vin. Abr. A. 1. and the cases there cited. 3 Mod. R. 53. *Ashby v. White*, 1 Com. Dig. A. 2. "Action on the case for *misfeasance*," A. 6. "Malicious *misfeasance*," Cro. Jac. 606.]

OAKLEY, J. This is a special action on the case. The first count of the declaration sets forth, in substance, that the plaintiff was possessed of the unexpired term of a certain house, and demised the same for one year to certain persons, who entered, and were in the quiet possession of the same as the tenants of the plaintiff : that the defendant knowing that they rightfully so held possession, as tenants of the plaintiff, and *wrongfully and maliciously intending to injure the plaintiff*, came to the premises, and threatened to seize the goods of the tenants then lying on the premises : that by means of such wrongful and malicious act of the defendant, he caused the tenants to remove from the premises, whereby the plaintiff lost his tenants ; the said premises became vacant and unoccupied for a long period, and the said plaintiff lost the rents and profits of the said house during such period.

The second count states the letting of the premises, as in the first ; and the entry and quiet possession of the tenants, and the knowledge of the defendant that they were rightfully in possession, and that the defendant *wrongfully and maliciously* intending

to injure the plaintiff, threatened to seize the goods of the tenants living on the premises, if they did not remove from the same : by means of which he caused the tenants to abandon the possession, and the plaintiff thereby lost his tenants and his rents, which *he would otherwise have received from the tenants* : that he was unable to procure other tenants for the premises, and that they remained vacant and unoccupied, and *were greatly dilapidated by reason thereof*.

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The third count sets forth a *malicious disturbance* of the tenants by the defendant, with the intent to deprive the plaintiff of his tenants, and prevent the occupation of the premises, and then avers, that by means thereof the tenants were obliged to abandon, and did abandon the premises ; that the plaintiff thereby lost his tenants and his rents, which he would otherwise have received, and that the said premises remained vacant for a long period, during which they were greatly injured by means of their being so vacant.

To this declaration there is a general demurrer, and the question is whether, in either of the said counts a sufficient cause of action is disclosed.

It is believed that this is an action of the first impression ; but that is no objection to maintaining it, if it appears to fall fairly within established principles.

In *Com. Dig. (tit. Action on the Case for Mifeseance, A: 6.)* it is laid down, that if man threatens the tenants of another, *whereby they depart from their tenures*, an action lies. On referring to 1 *Roll. Abr.* which is cited in *Comyns*, and to the *Year Book*, [9 *H. VII. p. 8.*] it appears that the tenants spoken of were tenants *at will*, who could dissolve their tenancy, or *depart from their tenures at pleasure*.

In the present case, the tenants, being tenants for years, could not, in judgment of law, depart from their tenures, though they might abandon the possession of their premises. The averment in the declaration, therefore, that the plaintiff lost his tenants, does not seem to set forth such an injury or damage as the law can notice. The case, however, in *Comyns* seems to establish the principle, that if a man, by interference with the tenants of ano-

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ther, or by disturbing or threatening them, causes damage to the landlord, an action will lie against him.

In *Pasley v. Freeman* (3 D. & E. 51.) it was held, that a false affirmation made by the defendant *with the intent to defraud the plaintiff, whereby the plaintiff receives damage*, is the ground of an action, though the defendant is in no way benefited by it, and does not act in collusion with the person who is.

In *Yates v. Joyce* (11 Johns. Rep. p. 136.) the second and third counts of the declaration set forth in substance, that the plaintiff had a judgment against A., which was a lien on a certain lot of land; that A. had no other property to satisfy the judgment, and was insolvent; and that the plaintiff caused the said lot to be taken in execution on the judgment. It was then averred, that the defendant knowing the premises, but *intending to defraud the plaintiff* of the recovery of satisfaction of the judgment, demolished certain buildings on the lot, whereby the lot became of less value, and the plaintiff lost the benefit of his judgment to that amount. To these counts in the declaration, there was a general demurrer: but the action was sustained. The court said, that the declaration showed, that the plaintiff had sustained damage by the act of the defendant, which he alleged was done fraudulently, and with the intent to injure him. Trespass, say they, will not lie, for the plaintiff was not in possession. If, then, there is any remedy for him, it is in this form of action; and they go on to lay down the general principle as a sound one, that where "the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages."

In that case, it will be remarked, that the immediate injury done by the defendant, by the destruction of the buildings, was to the *owner or possessor* of the land, who might clearly have had his action for the trespass. But the court count on the fraud, that because, the defendant knew the plaintiff's right, and the interest he had in the land by virtue of his judgment, and *intended an injury to him*, he should be responsible.

It seems to me, that the facts set forth in the declaration in this case, and particularly in the third count, bring it fairly within the principles established in the cases above alluded to. The plain-

tiff's allegation substantially is, that the defendant, knowing that he was the rightful possessor by his tenant of the premises in question, *and wrongfully and maliciously intending to injure him*, so disturbed his tenants, that they abandoned the possession, whereby he lost his rent, which he would have received if they had continued in possession, and the premises sustained injury and dilapidation, by reason of being vacant and unoccupied for the remainder of the year. Here is certainly damage to the plaintiff, and it is alleged to have been caused by the wrongful and malicious act of the defendant, committed with a full knowledge that he was violating the plaintiff's rights, and with the intent to injure him. The case seems in all respects to come within the general principle laid down by the court in *Yates v. Joyce*.

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1833.

Aldridge.  
v.  
Stuyvesant

It is said, however, that the tenant had no right to abandon the possession of the premises on account of the disturbance by the defendant; and that if the plaintiff had sustained the injury complained of, it is owing to the wrongful act of the tenants, and the plaintiff's remedy is against them. It does not follow, in my judgment, that because the tenants had violated their contract with the plaintiff, and are liable to him for the rent, that the defendant is to be excused from liability. The defendant has wrongfully, and with the intent to injure the plaintiff, caused the tenants to abandon the premises, and the damage, which is the gist of the action, is charged directly to his wrongful act towards the plaintiff.

Thus there are in the case *damum et injuria*, and where these are found united, they always constitute the ground of an action. I am of opinion, that the plaintiff is entitled to judgment on the demurrer.

*Judgment for the plaintiff on the demurrer, with leave to the defendant to withdraw the same on payment of costs.*

[W. Mulock, *Att'y for the plff.* P. A. Jay, *Att'y for the def't.*]

Oct. Term,  
1828.

Mitchell  
v.

Roulstone and  
Stickney.

ABRAHAM MITCHELL

versus

JOHN ROULSTONE AND MOSES B. STICKNEY.

On an attachment against the Sheriff for not returning the defendant's body, it appeared that bail had been put in, and had justified, subsequently to the rule for the attachment, but no notice thereof had been given to the plaintiff's attorney, although he was present at the justification. *HELD*, that the want of notice was an irregularity, and that the costs incurred subsequently to the rule should be paid by the Sheriff.

The certificate of the clerk, that the rule on which the attachment is grounded has been entered, must in all cases accompany the affidavit of notice of motion for an attachment against the Sheriff, for not returning the defendant's body.

*Judah* moved for an attachment against the sheriff of the city and county of New-York, for contempt, in not bringing in the defendants' bodies, founding the motion upon an affidavit containing the following statement of facts, viz :

The *capias ad respondendum* in this cause was returnable at the term of October, 1828. The first week in term had elapsed, and no bail had been put in by the defendants. The plaintiff then ruled the sheriff (on the 20th of October, 1828,) to bring in the defendants' bodies, and served due notice thereof, according to the practice of the court. At the expiration of the rule, the defendants perfected special bail, (the plaintiff's attorney attending at the justification,) but gave no notice of the filing of the bail piece, or of the bail having justified. The plaintiff's attorney demanded of the sheriff, and of the defendants' attorney, the costs upon the rule, and upon the subsequent proceedings.

Upon this state of facts, *Judah*, in behalf of the plaintiff, contended, that, as it was incumbent on the defendants, by the 9th rule of this court, to perfect special bail during the first week of term after the return of *mesne process*, and as the plaintiffs were allowed by the same rule to proceed against the sheriff, or upon the bail-bond, in default of bail being put in and perfected within the period stated; and as in this case no bail was offered until long after the time for putting in bail had expired, and after the sheriff had been ruled to return the defendants' bodies, bail could not now be tender-



without leave obtained upon a special application to the court. [1 *Arch. Pr.* 98.] That it was well settled, that on such an application, the court would not grant leave to file bail for the defendants without payment of costs. That permission to put in bail at all in this stage of the cause, was only to relieve the sheriff, and to prevent an attachment against him, and this was granted only on payment of costs. That the entry of the rule against the sheriff, is the foundation of a new cause, to which the original action bears the same relation that it does to a suit upon the bail bond. The sheriff cannot be excused from the contempt committed, but by the favour of the court. With regard to justification, it signifies nothing, where the sheriff has been ruled. [Lloft, 438.] In this case, bail was put in after the time allowed by the rules of court, and consequently was irregular. That even if it were regular, no proper notice of bail had been served, the attendance of the plaintiff's attorney before the judge, at the justification of the bail, being no waiver of the right of notice. The service of notice was material, since, without it the plaintiff was deprived of the opportunity of examining the bail piece, or of the affidavits of justification. That the plaintiff may proceed against the sheriff, even though he has opposed the bail, or consented to them, or has been informed of their justifying. [2 *Bos. and Pul.* 341.] That the sheriff is liable to an attachment, notwithstanding the bail have justified, provided the order for their allowance is not served on the plaintiff's attorney. [4 *T. R.* 493.] That justification is waived, if notice thereof be not served. [2 *Bos. and Pul.* 342.]

That the court will interfere from motives of judicial policy in enforcing the right to bail, and even if the motion for an attachment be denied, they will certainly order the sheriff to pay the costs of the rule to bring in the defendants' bodies, and of the subsequent proceedings, as they are not properly taxable in the original suit. [1 *Cow. R.* 214. 1 *Bos. and Pul.* 325. 3 *Bos. and Pul.* 603. 1 *Cow. R.* 54. 1 *Arch. P.* 80.]

*Kuney, contra*, in behalf of the defendants, contended, that the attendance of the plaintiff's attorney before the judge at the

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1898.

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v.  
Roulstone and  
Stickney.

Oct. Term,  
1893.

Wolf  
v.  
Luyster.

justification of the bail, was a waiver of the right to notice, and that the bail having justified, the motion ought to be denied. [1 Arch. P. 97. 1 Duml. P. 198.]

*Per Curiam.* The want of service of notice of bail was irregular, and not cured by the attendance of the plaintiff's attorney at the justification. And with regard to costs, it was the duty of the sheriff to pay such costs as were incurred by his own neglect in not bringing in the defendants' bodies pursuant to the exigency of the rule entered against him. The costs which have accrued subsequent to the entry of the rule are taxable as against the sheriff, and not in the original suit. The motion for an attachment must therefore be granted, unless all the costs which have accrued subsequent to the entry of the rule against the sheriff are paid within four days. (a)

JOEL WOLF *versus* ABRAHAM R. LUYSTER.

Where, upon demurrer to the plaintiff's declaration, the demurrer is overruled, and leave given to the defendant to answer over upon payment of costs, it is the duty of his attorney to seek the opposite party without delay, pay the costs, and plead to issue.

JUDGMENT having been rendered in favour of the plaintiff in this cause upon demurrer to his declaration, the defendant was allowed to withdraw the demurrer, and answer over upon payment of costs. The defendant having neglected to do this, the plaintiff proceeded with his cause, and executed a writ of inquiry.

*Mr. J. Anthon*, for the defendant, on an affidavit of merits, and papers showing, that after the execution of the writ of inquiry,

(a) At the argument, the court suggested, that on a motion for an attachment it was proper, that the clerk's certificate of the entry of the rules on which the attachment is grounded, should accompany the affidavits of service of notice of the motion, and that hereafter such certificate would in all cases be required. This is now the practice of the court.

and before the expiration of the rule for judgment, the defendant offered to avail himself of the benefit allowed him by the rule on the demurrer, and also that his neglect in not sooner pleading had arisen solely from the illness of his attorney, now moved to set aside the writ of inquiry and proceedings subsequent thereto, for irregularity. He contended, that the defendant was entitled to fifteen days after service of the rule for judgment on the demurrer, within which to plead and pay the costs, because no time for this purpose was fixed by the court.

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1886.

W.M.

v.

Luyant.

*Mr. Judah*, for the plaintiff, insisted, that his proceedings were all regular, it being the duty of the defendant, if he wished to avail himself of the proviso in the rule for judgment on the demurrer, to pay the costs, and plead immediately, viz. within twenty-four hours. [He cited 2 Cowen, 452-599. n. b. also Sands v. Mc Lellan, 6 Cowen, 582. and n.] He also contended, that if his proceedings were regular, they could not be set aside, a trial having been lost.

*Per Curiam.* The plaintiff's proceedings were all regular, according to the practice of the Supreme Court. Where a favour is granted to a party upon payment of costs, it is his duty to seek the adverse party immediately, or within 24 hours, pay the costs, and then avail himself of the benefit allowed by the rule. In this case, however, as it appears that the defendant's attorney was unable to attend to his professional duties, by reason of sickness, and there is an affidavit of merits, the proceedings upon the writ of inquiry, and subsequent thereto, must be set aside. The defendant, however, must pay all the costs up to this time, upon the presentment of the taxed bill; and until that is done, the judgment must stand.

[S. B. H. Judah, *Att'y for the plff.* H. Western, *Att'y for the def.*]

*Note.*—The court intimated that the practice in such cases, hereafter, would be, that if the taxed bill were not paid upon presentment, the party in whose favour it had been taxed would be at liberty to proceed.

Oct. Term,  
1888.Tally  
v.  
Hamilton.  
MICHAEL TALLY *versus* JAMES A. HAMILTON.

Where a plea in abatement has been interposed on the part of the defendant by mistake, and under a misapprehension of facts, the court will, upon a proper application, and upon prescribed terms, permit the plea to be withdrawn, notwithstanding it has been verified by affidavit.

THE plaintiff brought his action upon a certain agreement in writing made with the defendant, and the defendant pleaded, in *abatement*, the non-joinder of C. H. Hall as a co-defendant, he being a joint contractor with the defendant, and equally responsible to the plaintiff upon the agreement. The plea was verified by affidavit; but the defendant subsequently discovered that Hall, although in fact equally interested with him in the subject matter of the contract, had never signed the agreement, nor did it run in his name, although the defendant had always supposed that it was executed by him also; and with this impression he had interposed the plea in abatement.

*J. P. Hall*, for the defendant, upon an affidavit setting forth these facts, and showing that the plea was put in under a clear mistake and misapprehension as to the circumstances of the case, but in good faith, now moved for leave to withdraw the plea. [He cited *Arch. Prac.* 124. 7 *Taunt. R.* 278. (*Free. v. Hawkins*) and 2 *Strange*, 906-960.]

The motion was opposed by *Mr. O'Conner*, on the part of the plaintiff, who insisted, that as the plea was verified by affidavit, it could not be withdrawn.


*Per Curiam.* The plea, it appears, was put in under a mistake as to the facts of the case, and under such circumstances as to make the mistake natural. The court will, therefore, permit the plea to be withdrawn, notwithstanding it is verified by affidavit, for that was necessary; but it must be upon terms. The defendant must pay the costs of the motion, and such as pertain to the plea, and must plead an issuable plea without delay.

[*O'Conner, Att'y for the plff. P. Hamilton, Att'y for the defl.*]

GERSHOM SMITH

versus

THE NEW-YORK INSURANCE COMPANY.

Oct. Term,  
1888Smith  
v.  
N. York In-  
surance Co.  


Where an important witness is absent from the country, and will not return until several terms have elapsed, this court will put off a cause for a reasonable period, notwithstanding the delay may comprehend more than one term.

*Mr. O. Hoffman*, for the defendants, moved to put off the trial of this cause for several terms. He read an affidavit, showing that an important witness for the defendants was absent at sea, and was not expected to return for some months to come; but he would return before a commission could reach him, or be of service.

*Per Curiam.* The motion is no more than reasonable when addressed to this court, which sets at such short intervals, that witnesses who are absent have little chance of return before the cause is brought to trial. In the Supreme Court, where the terms are several months apart, a different practice may well prevail, and there it may be sufficient in general to put off a cause from term to term only. But the witness in this case cannot be expected to return, considering the place to which he is gone, before the time specified in the plaintiff's affidavit, and of course, not until long after the next term of this court. As that time is reasonable, considering the circumstances of the case, the motion must be granted.

*Motion granted.*

[E. Anthon, *att'y* for plff. Hoffman and Tallman, *att'ys* for defts.]

Oct. Term,  
1886.

Warner

v.

Lownds.

HENRY W. WARNER

versus

OLIVER M. LOWNDS, SHERIFF, &amp;c.

In an action on the case against a Sheriff, for *non-feasance*, wherein he is acquitted, single costs only are to be allowed to the officer, on taxing a bill in his favour.

THIS was an action on the case against the sheriff for a neglect of his official duty. The declaration contained two counts. In the first, the plaintiff claimed damages of the sheriff for not levying on the property of a defendant under certain executions issued in favour of the plaintiff; in the second, for not returning said executions. Plea, not guilty.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case to be made; on which case, judgment was finally pronounced in favour of the defendant, who now claimed double costs. The question was submitted to the court for directions to the taxing officer.

Before the court on the 11th day of November, 1886.

Mr. J. Anthon, for the defendant, observed,

That as this was an action on the case against the sheriff, ~~constituting in tort~~, for a neglect of his official duty, it was within the act; and the defendant, therefore, was entitled to double costs. [1 R. L. 155. *Grumner v. Huff*, 1 Wend. Rep. 24.]

II. Any neglect on the part of the sheriff, in the discharge of his official duties, is an act of *mal-feasance*, for which an action on the case lies; and the sheriff, in such actions, if acquitted, is always entitled to double costs. The only protection which the sheriff has against harassing actions on the case, is that afforded him by the statute, allowing double costs, and the act being remedial, must receive a liberal interpretation, to afford the security which it contemplated.

The cases of *Platt v. Osborn*, (2 Cow. 527.) and *Blanchard v. Bramble*, (3 Mau. and Sel. 131.) were actions of *assumpsit*, and

therefore expressly excluded from the act. But here, in an action on the case, sounding in tort, the defendant is entitled to double costs. *Mr. Warner, contra, in propria persona.*

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1838.

The People  
v.  
Lownds.

The statute giving double costs, in certain cases, is *penal*, and must therefore be construed strictly. [*Stone v. Woods*, 5 John R. 182.] And it has been often decided, that the statute does not apply to cases of mere *non-feasance*, or neglect of duty. [*Aikins v. Barnwell*, 3 East, 92. *Blanchard v. Bramble*, 3 M. and S. 131. *Platt v. Osborne*, 2 Cow. 527.] The cases last cited were actions on the case, (in assumpsit,) and were founded solely on the distinction between *non-feasance* and *mal-feasance*, in the construction of the statute.

THE COURT directed single costs only to be taxed in favour of the sheriff, considering this as a case of *non-feasance* merely on the part of the officer, and for which the action was brought.

[Mr. E. Anthon, *Att'y for the deft.* Mr. H. Warner, *in propria persona.*]

### THE PEOPLE

versus

OLIVER M. LOWNDS, SHERIFF OF THE CITY AND COUNTY  
OF NEW-YORK.

On an attachment against the Sheriff for not returning a *fi. fa.* RULED, that the recognizance be in double the amount of the *fi. fa.* and that the sheriff should answer such interrogatories as should be regularly exhibited.

An attachment had been issued against the sheriff for not returning a *fi. fa.* on which were endorsed directions to levy \$331 <sup>4</sup>/<sub>7</sub>. Judah moved, that the sheriff's recognizance to appear *de die in diem*, (until the court should determine concerning the matters objected against him,) be in double the amount of the *fi. fa.* with two sureties, according to the form in the first of *Cowen's Reports*, [580. n. (a.) See also *Herring v. Tylee*, 1 Johns. Cases, 31. and 1 *Dunlap's Prac.* 346.]

THE COURT directed the recognizance accordingly, and that the sheriff should answer such interrogatories as should be regularly exhibited.

Oct. Term,  
1893.

Langdon  
v.  
N. York Equi-  
table Ins. Co.

ISRAEL C. LANGDON

versus

THE NEW-YORK EQUITABLE INSURANCE COMPANY.

The keeping of ~~oil~~ and spirituous liquors by a grocer in his store for the "purposes of ordinary retail," "and in quantities not unusually large," is not a "*storing*" of them, within the meaning of that clause of the policies of insurance against fire, commonly used in the city of New-York, which prohibits the appropriation of the building insured, for the purpose of "*storing therein*," any goods denominated hazardous or extra-hazardous, in the memorandum of special rates annexed to the policies.

THIS was an action of assumpsit, upon a policy of insurance against fire, for five years, executed by the defendants in favour of the plaintiff, to the amount of \$2000, upon "a three story brick building, with a slate roof, situated on the corner of Hudson and King streets," in the city of New-York, *as described in a certain report*, filed in the office of the defendants.

The report here referred to was a *survey* made by the agent of the defendants, at their request and by their direction, wherein the building in question was described as unfinished at the date of the survey; but as one which was to be completed, with a *cellar* and cellar kitchen; the *first story* to have one room with a fire place, "*the store*, entry, and stairs."

This survey was produced at the trial by the defendants, upon the requisition of the plaintiff, and made part of the evidence in the cause, but the plaintiff had no knowledge thereof at the time it was made and filed in the office of the defendants.

The policy (like other fire policies in the city of New-York) contained the following clause, to wit: "And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned building shall, at any time after the making, and during the time this policy would otherwise continue in force, be appropriated, applied or used to or for the purpose of carrying on, or exercising therein, any trade, business, or vocation denominated hazardous or extra-hazardous, or



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"specified in the memorandum of special rates, in the proposals annexed to this policy, or for the purpose of storing therein any of the articles, goods, or merchandise, in the same proposals denominated hazardous, or extra-hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this corporation in writing, to be added to, or endorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, these presents shall cease, and be of no force or effect."

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1892.

Langdon  
v.  
N. York Equi-  
table Ins. Co.

In the proposals annexed to the policy, *oil and spirituous liquors* are classed among the goods denominated *hazardous*; but the *business* of a grocer is not included among the hazardous or extra hazardous occupations; while that of a *tavern keeper* is enumerated among the former.

The cause was tried before Mr. Justice Hoffman.

At the trial, the plaintiff proved that the building insured was worth \$3000, and that it was destroyed by fire on the morning of the first of November, 1827. The fire originated at some distance from the premises in question, in a yard fronting on Hamersley-street, whence it extended to a carpenter's shop in the neighbourhood, and from thence along the adjoining fences to a wooden building in Hudson-street, four lots distant from the building insured, and from thence along the intermediate buildings to the house in question. The witnesses for the plaintiff also testified, that the situation of the house, at the intersection of two streets, and the manner in which a part of it was built, indicated that it was intended for a "grocery store" at the time it was erected.

The defendants proved, that at the time when the house was consumed, and for some time anterior thereto, the store on the first floor of the building, and the cellar under the same, were occupied by one Archer, as a "family retail grocery," and that at the time of the fire, he had on hand, in the store and cellar, "some molasses, some potatoes, one cask of oil, one barrel of rum, one cask of Jamaica spirits, and one pipe of gin." The oil was in the cellar, and in its original cask; but from the other casks, more or less of the liquors had been drawn out for the use of the store:

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v.  
N. York Equi-  
table Ins. Co.

and all the liquors in the store had been taken from these casks. These goods were purchased and kept for the purpose of being sold in small quantities by retail. Archer *usually* kept all kinds of spirituous liquors, and used the cellar for the purpose of putting a part of his goods therein; but such only as were intended to be retailed in the store, which was replenished, as occasion required, from the stock in the cellar. At the time of the fire, the goods in the store were saved; but those in the cellar were consumed.

The counsel for the defendants then offered to prove, that it is, and ever has been, the *uniform custom* among underwriters on policies against fire in the city of New-York, in all cases of insurance upon grocery stores, where it is the intention of the insured to keep spirituous liquors therein, for sale by retail; to state such privilege, either by inserting it in the body of the policy, or by endorsement thereon, or by some other memorandum in writing. But this testimony was excluded by the presiding judge, and the counsel for the defendant excepted to his opinion.

Upon this state of facts, the counsel for the defendants contended, that the plaintiff was not entitled to recover; and prayed that the jury might be charged, that keeping a "*grocery store*" in the said building, and the keeping of oil and spirituous liquors therein for the purpose of retail, in the manner herein before mentioned, was a "*storing*" of the same, within the meaning of the policy, and a violation of the contract on the part of the plaintiffs, which precluded a recovery.

This instruction the presiding judge refused to give, but charged the jury that the plaintiff was entitled to recover to the extent of the loss proved; and the jury thereupon returned a verdict for \$2000 in favour of the plaintiff.

The counsel for the defendants having objected to this opinion, now moved for a new trial, upon the ground of a misdirection.

*Mr. C. C. King*, for the defendants, made the following points:

I. That the keeping of spirituous liquors and oil in the "*store and cellar*" of the building, for the purposes of sale in the manner stated in the testimony, was a "*storing*" therein within the

intent and meaning of the policy; and that as the building was used for such purposes at the time of the fire, the policy was void.

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II. The testimony as to the usage, offered at the trial, was admissible, for the purpose of showing the real meaning of the term, "storing," as used in the policy.

Every express stipulation or condition contained in the policy, must be strictly performed, whatever may be the motive of its insertion, or whether material to the risk or not. [1 *Condy's Mar.* 348. *Phil. on In.* 124, 125. *Park. on In. ch.* 18. (Lon. ed.) 318, 319, 20. 3 *Kent's Com.* 235. and the authorities there.] If the warranty be not complied with, although for the best reasons, the policy has no effect. [*Park.* 320. *Marsh.* 349. *Phil.* 127, 128.]

This is the rule relative to marine policies, and there is no difference in this respect between marine and fire policies. [*Fowler v. The Aetna Ins. Co.* 6 *Cow. Rep.* 673. 3 *Dow.* 282. 4 *Muss. R.* 330.] The rate of insurance shows, that no hazardous risk was contemplated, and there is nothing in the policy itself which waives the conditions. The survey says, that the first story is to have one room with a fire-place, "the store, entry, and stairs." This was all the written evidence offered at the trial, and it cannot be pretended, that it is "specially provided in writing," by this survey, that the building might be used for the storing of hazardous articles therein. The term "store," used in the survey, does not imply a permission to use the building for any purpose not warranted by the policy: because the implication (if admissible at all) must be such a necessary implication as to amount to a special provision in writing. To reach this, the words must, *ex vi termini*, mean a store in which hazardous and extra-hazardous goods may be kept. But this is by no means a necessary implication arising from the expressions of the survey. Neither does the situation of the building at the intersection of two streets indicate, as a necessary consequence, that it was to be used for a grocery. There was no proof that it was to be appropriated to this purpose, and yet the court are called upon to infer a fact, and from that, a privilege, which cannot exist except by express permission in writing. That oil and spirits were in the building at the time

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of the fire, is fully proved, and the question is, whether they were stored there in such manner as to violate the contract, and avoid the policy.

In the common acceptance of the terms, the *keeping* of goods in a place for sale or preservation, is a *storing*. In this sense of the word, the policy was undoubtedly violated; and if a storing be proved, then, by the rules of construction, applicable to the express stipulations in the policy, the court must intend that it is a storing within the meaning of the contract, unless the contrary clearly appear.

The quantity of goods in the store, or the mode of sale, cannot affect the question; because, if the policy be construed by this rule, it may include one grocer, and exclude another, which is manifestly incorrect. The rules of construction must be uniform and consistent, and if the business of a grocer necessarily implies that hazardous goods may be kept by him for sale within the building insured, then the extent to which that business may be carried on, cannot be the criterion by which to establish the meaning of the words used.

But if there were a doubt upon this point, then the testimony of the witness was admissible, not to prove the contract, but the acceptance of the term "*storing*," among those who are most interested in the question. We are seeking after the meaning of a peculiar term used in the policy, and if that be doubtful, the manner in which it is received by uniform custom—by the usage—may be proved by parol. [*Beau. v. Stupont, Doug. 11.*]

*Mr. J. Anthon and Mr. Slosson, for the plaintiff.*

There are no adjudicated cases bearing upon the point now before the court, and the only way in which the question can be solved, is by a critical examination of the policy itself. It is said, that the construction to be given to this contract must be *strict*. If by *strict*, an interpretation is meant, derived from the words of the agreement itself, we admit that the construction must be strict, and we claim that, from the very terms of the policy, the property of the assured was fully protected.

In the first place, the articles usually kept in a grocery store, are not to be found among those denominated hazardous or extra-

hazardous, in the "proposals for insuring" attached to the policy. And were it not for the proviso in the agreement itself, the assured would have a perfect right to keep a "store" of any kind in the building insured.

This proviso is to be divided into two parts: the first has reference to the business to be carried on, and the second to the articles which may be stored.

With regard to the first, the plaintiff has an undoubted right to carry on any business in the building, which is not prohibited by the policy. Now, the business of a grocer is not prohibited by the policy, nor is it classed among the "trades" or occupations denominated hazardous or extra-hazardous by the proposals. If, then, the assured may carry on the business of a grocer, without any objection derived from the contract itself, he may undoubtedly carry it on to its fullest extent. Any fraudulent evasion of the policy, by the storing of an unusual quantity of spirituous liquors, not necessary for the business carried on, might perhaps be fatal to the contract. But here there are certain trades and occupations (ship chandlers, tavern keepers, tobacco manufacturers, &c.) excepted by the terms of the contract; and the exceptions prove that the agreement covers every occupation not expressly prohibited.

Besides this, the insurers knew from the report of their own agent, that a part of this building was to be occupied as a grocery, and they knew it also, from the nature and situation of the premises insured. There is no surprise in the case, no deception, no fraud; and there is no pretence that any real injury has actually occurred to the defendants from the use to which this building was appropriated. Can this defence, then, be sustained upon the grounds assumed by the defendants? and will the assured be allowed to shield themselves from the obligations of their contract by a forced construction of their own words?

II. But what is the real meaning of the words, and what construction is to be put upon the term *storing*, as used in the policy? In its correct acceptation, the word means, the repositing of specific articles in a warehouse for preservation and redelivery to

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1882

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estate Ins. Co.

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*specie*; and there can be no good reason why any other meaning should be attached to it, in construing a policy of insurance.

There is a broad distinction between goods deposited on *storage*, and those kept for the purpose of being sold by retail: and the reason for the distinction is obvious. If a warehouse used for the purposes of *storing*, contain a large quantity of spirituous liquors and oil, these very articles, if once set on fire, would cause the conflagration of the premises insured, and every thing connected with them. But the accidental burning of such small quantities of spirituous liquors as are usually kept by a grocer, would hardly produce this result, and was never contemplated by the parties. If the construction contended for by the defendants be correct, if the quantity of the articles prohibited, and the purpose for which they are kept, have no bearing upon the meaning of the word, as used in the policy, what private dwelling which contains a cask of brandy, can be considered as safe within the terms of this agreement? If the keeping of spirituous liquors and oil in a grocery for the purpose of ordinary retail, can be considered as a *storing* within the meaning of the policy, the same meaning must be extended to the keeping of the same articles in a private dwelling for the purposes of ordinary consumption. Such a construction of the contract never entered into the contemplation of the parties, is not warranted by a fair interpretation of the words used, and would work special injustice to those who have paid their money upon the faith of the indemnity held out by the contract.

Mr. David B. Ogden, in reply.

We abandon the second point presented for argument on the part of the defendants, believing that the court will, in all probability, be against us as to that. But upon the *first* point, we confidently rely. If the insurers are protected by the laws of the land, they are to be considered as *justly* protected; and no argument drawn from the adventitious circumstances of any particular case, can weigh with the court in expounding the terms of a written agreement.

The defendants are not bound beyond their own express contract, as contained in the policy; and the whole question in the

case is confined to the construction to be put upon the word "*storing*," as used by the parties. What are the facts of the case? The plaintiff has effected insurance upon a "three story brick building," situated at the intersection of two certain streets. He appropriates a part of the building insured as a grocery store. In the *cellar* of this building he deposits a quantity of spirituous liquors and oil, and carries them from their place of deposit into his store for sale. Is not this "using or appropriating" the building insured "for the purpose of *storing* therein articles denominated hazardous in the proposals," attached to the policy? The goods are *stored* in the cellar, and carried from thence to the shop, from time to time, for the purposes of sale, as occasion may require. This is an obvious violation of the very words of the contract, and the court cannot restrict the meaning of the terms by any inquiries as to the quantity of goods thus stored in each particular case. The construction to be given to the words is matter of law, and that construction must be uniform and consistent, else the meaning of the terms used may vary with different cases, and be wholly uncertain and indefinite. If the construction depends upon the *quantity* of goods repositied, or the *purposes* for which they are kept, then what is the quantity, and what are the purposes, which may amount to a *storing* within the meaning of the policy? By the rule contended for, the *present* plaintiff may recover, while *another* grocer, more extensively engaged in the business of his vocation, may be totally unprotected. Such an interpretation of the word is altogether too loose and vague to be adopted by any court in fixing a legal meaning upon the terms of a written contract. But it is said, that the construction contended for by the defendants may vitiate a policy upon the residence of a private individual. If this were to be the consequence, it cannot vary the matter; for no private individual has a right to increase the risk of the underwriter, by storing spirituous liquors in his dwelling house. But there is an obvious distinction between the case of a grocer and that of a private individual. The former keeps his goods for the purposes of *sale*, whereby the risk is greatly enhanced, while the latter keeps a mere private stock for his own use.

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We are told however, that the defendants *knew* that a part of this building was to be used as a grocery, at the time they made the insurance. There is no proof of this. But if the fact were so, does it follow, because a building is to be used as a grocery, that *spirituous liquors* are to be stored therein by the permission of the underwriters? They may perhaps allow the grocer to keep such articles as enhance not the risk; but they give him no permission to keep hazardous articles by reason of his occupation. But there is no authority given, by any express words, for the *keeping of a grocery* even: the power is derived from implication, and you cannot, by implication, extend the obligation of the insurers beyond the terms of their agreement. This would be unjust, as well as illegal, for they may be compelled by this means to assume a risk they never contemplated, without any adequate premium.

OAKLEY, J., after stating the facts of the case.

The principal question arising on the bill of exceptions taken at the trial, is, whether the above state of facts suspended the policy, so that it did not cover the building at the time of the fire, by virtue of the clause contained in it, which provides, in case the building insured should at any time, during the continuance of the policy, be used for the purpose of carrying on any trade, business, or vocation denominated hazardous or extra-hazardous, as specified in the memorandum of special rates in the proposals annexed to the policy, "or for the purpose of *storing therein* any of "the articles, goods, or merchandise, in the same proposals denominated hazardous or extra-hazardous, unless specially provided for in the policy, or subsequently agreed to by the defendants "in writing; that then, so long as the same building should be "so appropriated, applied, or used, the said policy should cease, "and be of no force or effect." In the proposals annexed to the policy, *oil and spirituous liquors* are denominated hazardous articles.

It is contended, on the part of the plaintiffs, 1st. That the building being used as a "*store*," and the business of keeping a grocery store not being denominated hazardous, and therefore not pro-



bibited by the policy, the plaintiff had a right to carry on that business, and to keep all such articles as are usually kept in such stores.

2. That if not, the keeping of the liquors and the oil, under the circumstances, was not a *storing*, within the meaning of the contract.

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Where the insurance is general on the building, or where a store in general terms is insured, the true construction of the policy undoubtedly is, that all kinds of business may be carried on, and all kinds of goods or merchandise kept in the building, except such as are *expressly prohibited*. Any other construction would render all the restrictions in the policy inoperative and void. Some efficacy must unquestionably be given to the clause which prohibits the *storing* of hazardous articles, without the written consent of the defendants. If the right of storing such articles followed as appurtenant to the general business of a grocer, it would equally follow as appurtenant to that of a commission merchant. His business, *as such*, would not be prohibited by a policy like the present; and yet it might consist entirely in storing the hazardous or extra-hazardous articles enumerated in the policy.

Thus it will be seen, that upon the construction contended for by the plaintiff, a case can scarcely be imagined in which the prohibition in the policy, against the storing of such articles, could be applied. The true meaning of the contract seems to me to be very clear and simple. The plaintiff is authorized to keep any store in the building insured, provided in doing so he does not use any part of it for the purpose of storing certain articles of merchandise, which are denominated hazardous or extra-hazardous in the policy itself.

The only question then is, whether the keeping of the casks of oil and spirituous liquors in the cellar of the building, in the manner in which they were kept, is a violation of the prohibition in the policy.

In the present case it appears, that the oil and liquors in question were purchased by the grocer, and deposited in his cellar. The cask of oil was unbroken, but the casks of liquors were partly drawn out. These casks were deposited in the cellar for the pur-

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pose of replenishing his store from time to time, as occasion might require. They constituted then a part of his ordinary stock in trade as a retail grocer, and I am of opinion, that the keeping of them under the circumstances, and for the purposes of ordinary retail, and not in universal quantities, is not a *storing* of them, within the meaning of the clause in the policy under consideration.

It is difficult, perhaps, to affix any precise meaning to the word *storing*, as used in the policy. Its import is in a degree vague and uncertain. Without undertaking here to define it, it is sufficient to say, that it does not, in my judgment, reach a case like the present.

*Judgment for the plaintiffs.*

[E. Anthon, *Att'y for plff.* C. C. King, *Att'y for defs.*]

*Note.*—One of the principal points of defence relied upon by the underwriters, at the outset of this cause, rested on the ground, that the plaintiff had materially increased the risk, after effecting the insurance, by dividing off 20 feet of the rear of the lot upon which the building stood, at the distance of 75 feet from the house, and erecting thereon a *carpenter's shop*. This point was presented to the court at the trial, and insisted on as a substantial ground of defence: but the judge charged the jury, that if they considered the risk to be *enhanced* by the erection of the carpenter's shop, they would find a verdict for the defendants. The jury found, however, that the risk was *not* thereby increased, and the defendants, therefore, did not make this a point of defence upon the argument at bar.

The defendants also offered to prove by parol, that it is the custom among underwriters, whenever they insure a grocery, to exact a higher premium than for an ordinary building. But upon the question being objected to, it was withdrawn; the presiding judge intimated, however, that the inquiry was improper.

The counsel for the *plaintiff* in the course of the trial, upon the examination of the surveyor of the defendants, asked him, "whether the plaintiff did not inform him, at the time the survey was made, that the *store* in the building was intended for a grocery?" This question being objected to was overruled by the judge, and an exception taken to his opinion by the counsel for the plaintiff. But this exception was not afterwards brought forward, or in any way agitated upon the argument before the whole court.

This cause was subsequently carried into the Supreme Court by writ of error, where the judgment of this court was affirmed.

Oct. Term,  
1828.PETER BALLINGALL *versus* JAMES BURNIE.

Ballingall

v.

Burnie.

Where a defendant, in an action of assault and battery, has been held to bail without affidavit, and without an order of a judge for that purpose, to an amount exceeding \$500, the court upon application will order the bail to be reduced to that sum.

THE defendant was arrested and held to bail in the sum of \$10,000, in an action of assault and battery, without any order for that purpose, and without any affidavit on the part of the plaintiff upon which such order could be granted.

*Mr. E. Wilkes*, on the part of the defendant, now moved, that the bail-bond should be set aside and cancelled, or that the bail should be reduced to \$500, the amount fixed by the rules of the court in ordinary arrests of the kind. He said, that in cases where there was no affidavit, or where the affidavit was defective, or not duly filed, or where the sum sworn to is not endorsed on the writ, the court would discharge the defendant on common bail. [*Tidd's Prac.* 165.]

*Mr. Hugh Maxwell*, *contra* insisted, that the affidavit to hold to bail might now be made, and all irregularities of proceeding cured by a subsequent compliance with the rules of the court. He proposed to file such an affidavit, and to show the court that this was a proper case for heavy bail, and for the exercise of its discretion. The ordinary sum of \$500 would leave the plaintiff almost without a remedy, and if the irregularities of the first step could not be cured, serious injury would result to the plaintiff.

*Mr. Wilkes*, in reply, contended, that the proceedings were oppressive in themselves, and a contempt of court. That the affidavit to hold to bail would now come too late, or at all events, would only justify the holding to bail in the ordinary sum of \$500. [*Bunting v. Brown*, 13 *John. R.* 425.]

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1828.

Austin  
v.  
Dewey.



The Court, on a subsequent day, ordered the bail to be reduced to \$500, and that the bail should be discharged as to the excess beyond that sum.

[H. and E. Wilkes, *Att'ys for the def't.* W. P. Hawes, *Att'y for the plff.*]

### AUSTIN *versus* DEWEY.

A seaman, charged with disobedience of orders and mutinous conduct, was voluntarily discharged from the ship by his captain, who expressed regret for the difficulties which had occurred, and promised to pay the seaman his wages. In an action brought by the latter against the master, it was held, that the captain's promise operated as a waiver of any forfeiture of wages by the seaman, for disobedience of orders during the voyage.

CERTIORARI from the Marine Court. The present defendant brought an action in the Marine Court against the plaintiff, as master of the ship Savannah, to recover the amount of his wages, as a seaman on board that vessel.

The defence set up was disobedience of orders and mutiny on the part of the seaman, and desertion of the ship before her cargo was discharged.

This defence was met by proof, that the seaman left the vessel with the captain's permission, who promised, after the arrival of the ship, to pay him his wages, and expressed regret for the difficulties which had occurred on the passage.

The cause was tried before the justices of the Marine Court, without the intervention of a jury, and judgment being rendered in favour of the plaintiff, the defendant below brought the cause into this court, by *certiorari*.

*Mr. Gerard*, for the captain, went into an examination of the testimony to prove the facts as to disobedience of orders: but as they are not noticed in the opinion of the court, they are not here set forth. He contended, that the shipping articles were conclusive evidence of the contract between the parties: [*Abbot on*

*Ship. 472.] and that seamen, by disobedience of orders, forfeit their wages. [He cited Abbot, 456, 7: and the act of Congress, of July 20, 1790.]*

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*Mr. Clizbe, for the defendant, examined the testimony at large, and the points of law. He contended, that the defence being founded entirely upon a clause in the agreement between the master and seaman, is not to be favoured, because the latter can hardly be supposed to be acquainted with the extent of his obligations. For disobedience of orders, he is liable to punishment, and the court will not willingly superadd another. [He cited 2 Mason's Rep. 556.]*

**OAKLEY, J.** The defendant in error sued the plaintiff in error in the Marine Court, for his wages as a seaman on board the ship Savannah. The defence to the action rested on the ground, that the seaman had been guilty of disobedience of orders and mutinous conduct during the voyage, and that he had left the ship before the end of the voyage, without the permission of the captain.

It is not necessary to consider, whether any act of disobedience or mutiny, on the part of the plaintiff below, was proved, or whether such act, if proved, worked a forfeiture of his wages. It sufficiently appeared, from the evidence in the case, that after the vessel had arrived at New-York, the captain voluntarily discharged Dewey from the ship; that he expressed his regret that any difficulty had occurred during the voyage, and promised to pay him his wages. Such a promise by the captain, under the circumstances of the case, we think operates as a waiver of any forfeiture of wages by disobedience of orders, during the voyage. The court below appear to have rested their judgment on this view of the case. We think they were right, and that their judgment must be affirmed.

*Judgment affirmed.*

[Ira Clizbe, *Att'y for the deft. in error.*]

[Henry M. Western, *Att'y for the plff in error.*]

Oct. Term,  
1828.

The People,  
v.  
Godfrey.

THE PEOPLE, *ex relatione* JAMES R. WHITING,

*versus*

JAMES GODFREY.

In an indictment, under the act to prevent forcible entry and detainer, [1 R. L. 96.] the defendant may be convicted of forcible detainer only.

In a prosecution of this nature, the title to the premises, as between the defendant and the *relator*, cannot be inquired into; although the latter is bound to set forth his title, so far as to show himself to be within the provisions of the act. That title may be controverted by the defendant, but he cannot set up his own as a substantive matter of defence: because the question of title cannot be tried in this action.

THE defendant in this case, was tried on the 4th day of September, 1828, before Mr. Justice Hoffman, on an indictment found by a jury, impannelled under the act entitled, "an act to prevent forcible entry and detainer." [1 R. L. 96.]

At the trial the *relator*, for the purpose of showing his title to the premises in question, and his possession thereof, offered in evidence, 1. A lease from Peter Ogilvie to one William Peet, of the lot and premises known as 221 Delancey-street, in the city of New-York. This lease was for a term of 21 years, from the first day of October, 1825, reserving a rent of fifty dollars per annum, and was duly recorded in the office of the Register, for the city and county of New-York, on the 21st day of April, 1826.

2. An assignment of this lease from Peet to one Newcomb, for the consideration of \$600, dated the first day of May, 1826, and recorded on the 13th of March, 1827. On this assignment was endorsed a condition or defeasance, by which it was agreed, that upon the payment of the last-mentioned sum by Peet to Newcomb, on or before the first day of the July next following, the assignment was to be void. This assignment was recorded on the 13th of March, 1827; and on the same day Peet released the *defeasance* to Newcomb.

3. An assignment of said lease by Newcomb to one Scott, on the same 13th of March, and from Scott to the *relator*, on the first day of September following, for the consideration of \$775.

4. Various receipts for rent, paid by the relator to Ogilvie.

The plaintiff then called one Henry Thison, as a witness on his part, who testified, that shortly after the assignment of said lease by Scott to Whiting, he, as the agent of the relator, and by his request, *took possession of the premises in question*, and informed the tenants thereon, that they were no longer to pay rent to Scott, but to Whiting; and the witness afterwards collected the rent from several of the tenants for the relator.

He also further testified, that three or four of the agreements for rent made between the tenants and Scott, were handed over by the latter to Whiting at the time of the assignment. That a *lower back room of the premises had been leased to one Badeau*, who abandoned it in January, 1828, and that *the defendant, some time afterwards, was found in the possession of it*.

In the month of March following, the witness, as agent of the relator, ordered the *defendant* to leave the room; but he refused, and said, that "no man should enter it but over his dead body." The defendant continued in possession of the room until the first of May, 1828, when the lease of the other tenants expired. He then took possession of the *entire premises, claiming title* thereto. The witness at a subsequent period again attempted to take possession for the relator, but was resisted by the defendant, who again said that no man should dispossess him but at the expense of his life. The defendant insisted upon his right to retain possession, and claimed title to the premises: and the relator since that time had never derived any benefit from the same.

*Elisha Morrell, Esq.* one of the Justices of the city of New-York, then testified, that on the first day of May last, at the solicitation of the relator, he went to the premises, and there saw the defendant, who claimed title thereto, and insisted that the relator should leave the same.

That he (the witness) enquired as to the force—recorded it, and imposed a fine of \$5 upon the defendant.

Upon this state of facts the relator rested his cause.

The defendant then offered to prove, that the premises were worth \$1500: that he had paid a full consideration for the same,

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and that they were conveyed to him by Peet, by deed bearing date the 18th day of October, 1826, for the consideration of \$1400; that he had taken *peaceable possession* of the premises, and held them under a good title.

The relator objected to this evidence; but stated that he would show that the title set up by the defendant was fraudulent. The presiding Judge, decided that the question of title could not be investigated in a trial of this nature; that the relator being only a mortgagee of the lease, and the defendant having come peaceably into possession of the premises, claiming title under the deed of Peet, no further evidence was necessary on the part of the defendant, and that he should direct a verdict for him.

The defendant then read the deed from Peet to him, which appeared to have been recorded on the 19th of October, 1826; and offered to prove, that he had paid the consideration named in it, and that the transaction between himself and Peet was *bona fide*. But this evidence the presiding Judge refused to receive.

The Judge then charged the jury, that the question of title was not to be taken into consideration by them; but that they were to *enquire into the force*, and might convict the defendant of forcible entry and detainer, or of *forcible detainer only*; and stated, that whatever might be their verdict, the court would regulate it according to the law of the case.

The jury found that the defendant was *not* guilty of forcible entry, but *was* guilty of a forcible detainer.

*Mr. F. A. Tallmadge*, for the defendant, now moved for a new trial, and contended, I. That the jury having found, that the defendant was not guilty of a *forcible entry*, but on the contrary, that the entry was peaceable and *under claim of title*; the subsequent detainer could not in judgment of law be deemed either forcible or unlawful. [*Vin. Ab.* 383. *F. n.* Also p. 385. *n.* *Coke Lit.* 257. (*notis.*)]

II. If the defendant was peaceably in possession, neither the relator nor the rightful owner himself could forcibly eject him without falling under the penalties of the statute. This statute



was not framed for the purpose of settling questions of title, or the right of possession : but merely to prevent the exercise of force in obtaining possession. [11 *John. R.* 504.]

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But if the title had any bearing upon the questions before the jury, then the defendant ought to have been permitted to show what his claims to the premises actually were. The relator was permitted to show *his* title, and was not restricted to proof of possession merely. The defendant, on the contrary, relying upon the intimation which fell from the Judge, that there could be no conviction for a forcible detainer, where the entry was peaceable, and under color of title, was prevented from showing what the strength of his title was.

But the title cannot be enquired into, and the entry being peaceable under *colour* of title, the defendant had a right to resort to force if necessary to defend that possession, which he had already lawfully taken.

III. The relator was never in such an exclusive possession of the premises, as would render the acts of the defendant a violation of the statute against forcible entry and detainer. He was the mere mortgagee of a lease, and never took actual possession of the premises ; but relies upon a *constructive possession*, derived from the attornment of the tenants. It is a sufficient answer to this suggestion, that the *defendant* never attorned to the relator, and never acknowledged his rights. Besides this, the mortgagor can never be ejected summarily, but is always entitled to notice to quit. [4 *John R.* 186.] The defendant is as much entitled to protection as the relator : for if he were a mere lessee at will, he could have the benefit of this act, although he could not maintain trespass against a person claiming title. But his *right* was prior in time to that of the relator, and there is no proof that his possession did not precede that of the other party ; he was fully justified, therefore, in the course he pursued, and had perfect right to defend his peaceable possession. [2 *Hawk. Ch.* 64. 4 *John.* 180. 3 *Term. R.* 292. 3 *Blac. Com.* 174. 6 *Bac. Abr.* 566.

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IV. If the defendant *entered* peaceably, he cannot be held to *detain* unlawfully. There can be no indictment without force, [Cro. Jac. 144.] and the jury under the charge of the Judge ought to have acquitted the defendant. Upon this point the charge of the Judge was entirely correct : for although the Supreme Court has decided, that there may be a conviction under this act for a forcible *detainer*, their decision applies only to cases where the entry was wrongful, and without colour of title. The finding of the jury was against the charge of the Judge, and against law : the defendant is therefore entitled to a new trial.

*Mr. Barnes*, for the relator, (with whom was the relator *in propria persona*.)

The object of the statute under which this indictment was found, was to prevent persons from doing themselves justice, by the employment of force, even although they might have title. The question of title therefore does not arise under this proceeding, and the enquiry relates exclusively to the *possession*. It is immaterial whether the relator was the owner in fee, or mortgagee merely : for he was at all events *mortgages in possession*, and that is the only subject of enquiry. The defendant confined his offer to an investigation of his *own* title, without attempting to adduce proof, that he ever had any *possession* of the premises, anterior to that of the relator. This could not be permitted in this proceeding, and the Judge was right in excluding the testimony. [11 John. R. 504. *People v. Richard*, 8 Cowen 226.

The enquiry then, in the first place, is limited to the question of *possession*; and upon that point the case is clearly with the relator. It is not pretended by the defendant, that he ever had possession of any part of the premises, until the room occupied by Badeau was abandoned by him. This was at a period some time subsequent to January, 1828. Now, the lease of the entire premises was transferred by Scott to Whiting on the first day of September, 1827. Immediately after this, Whiting gave notice of the transfer to the tenants (of whom Badeau was one) and received rent from them. He took *actual possession* by his agent, and he had

*legal possession* through his tenants; for the possession of the tenant is that of his landlord.

The defendant does not pretend to hold under Badeau, but remits himself back to an anterior title, upon which he pretends to rely, instead of possession. It is no reason for a new trial, that the relator was permitted to exhibit his title; for it merely shows, that he proved more than he was bound to prove, and more than was required by law.

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v.  
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II. The relator having shown himself in such possession as the law requires, and having proved himself entitled to the protection of the statute, the only question is, whether there may be a conviction for a forcible detainer merely, where the entry is peaceable.

It is conceded by the counsel for the defendant, that the law is well settled that there may be a conviction for a forcible detainer: but he restricts it to a case where the entry was unlawful.

The jury in the present instance have merely found, that the entry was *not forcible*, and from that finding, the court are not to deduce the inference that the entry was lawful. The evidence clearly shows that it was *illegal*, and the title is set up as a mere colour for the wrongful acts. The defendant entered after Badeau abandoned; if he held under Badeau he would have been the tenant of the relator, and might have been ejected under the act relative to landlords and tenants. But he claims title in himself, and the relator has resorted to the only expeditious remedy known to the laws. If this verdict be not permitted to stand, then every individual is exposed to the hazard of finding his dwelling in the hands of a stranger, who may drive him to an action of *ejectment* to recover that possession of which he is so unjustly deprived.

*Per Curiam.* On an indictment for a forcible entry and detainer, it is settled beyond all question, by the decisions of our own courts, that the defendant may be convicted of a forcible *detainer only*. [*The People v. Anthony*, 4 J. R. 198. *People v. Richard*, 8 Cowen 226.]

Oct. Term,  
1824.

The People  
v.  
Godfrey.



In this case the jury have found the defendant guilty of a forceable detainer, from all the evidence spread before them ; and the court have no disposition to interfere with their decision upon the questions of fact.

Although the *title* to the premises cannot be enquired into, in a prosecution of this nature, still the *relator* is bound to set forth *his* title so far as to show himself within the provisions of the act. The title of the relator may be controverted by the defendant, but he cannot set up *his own* as a substantive matter of defence. The question of title, as between the relator and the defendant cannot be tried in this manner ; but the latter, if his claim is paramount to that of the relator, must resort to an appropriate remedy to maintain his rights. [*People v. Nelson*. 13. *John. R.* 40. 8 *Cow. R.* 226.]

It is urged by the counsel for the defendant, that he is to be considered as standing in the place of Peet, the mortgagor, and that he is, at all events, entitled to notice to quit, before any legal proceedings can be instituted to eject him. But the assignee of a mortgagor is not entitled to notice to quit ; [*Jackson v. Fuller*, 4 *John. Rep.* 215.] and the defendant evidently intended to defend his possession at all hazards.

The reasons shown by the counsel for the defendant are not sufficient to induce the court to disturb the verdict of the jury, or grant a new trial.

*New trial denied.*

[J. B. Whiting, the relator, for the People. F. A. Tallmadge, Atty for the def't.]

LEWIS K. BRIDGE

versus

THE NIAGARA INS. CO. OF NEW-YORK.

Dec. Term,  
1888.

Bridge  
v.  
Niagara Ins.  
Co. of N. Y.

A contract for the benefit of a third person made without his knowledge or authority, is a binding contract on the promiser; and if subsequently adopted by him for whose benefit it was made, it may be enforced by him.

The plaintiff in this case was a general agent for a merchant residing at Carthage, who was in the practice of making shipments to New-York. On the 19th of February 1827, the plaintiff, without any orders from his principal, caused an open policy of insurance for \$5000 on goods laden or to be laden on board any vessel from Carthage to New-York, on account of his principal, to be executed by the defendants, who received the premium. On the 17th of February the agent wrote to his principal informing him of his intention to effect said policy, and on the 23d of March following the principal replied to his letter, and conditionally affirmed his act.

On the 21st of February, two days after the policy was effected, a loss occurred, by the perils insured against, on goods shipped by the principal on board the brig Mary from Carthage to New-York.

Held, that they were covered and protected by the policy: that the defendants having contracted with the agent for the express benefit of the principal, and having received the premium, could not be permitted to show any want of authority in the agent, and that the principal having adopted the act of the agent, could enforce the contract in the name of the agent.

This was an action upon a policy for insurance tried before Mr. Justice HOFFMAN. The policy was an open one in the usual form, on cargo for \$5000, dated the 19th day of February, 1827, and subscribed by the defendants. That part of it, which is deemed material to this case, was as follows. viz:—

“Cargo. By the Niagara Insurance Company of New-York:  
“Lewis K. Bridge, on account of Amos Foster, of Carthage, or  
“whomsoever it may concern, do make insurance, and cause to  
“be insured, lost or not lost, at and from Carthage to New-  
“York, upon all kinds of lawful goods and merchandises, laden or  
“to be laden on board the good vessel or vessels” &c. “beginning  
“the adventure upon said goods and merchandises from and im-  
“mediately following the loading thereof on board of the said  
“vessel at Carthage aforesaid, and so shall continue and  
“endure until the said goods and merchandises shall be safely

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"landed at New-York aforesaid." "Having been paid the consideration for this insurance by the insurer or assigns at and after the rate of one and a half per cent. in specie, or merchandise, or both; and in case of loss, such loss to be paid in thirty days after proof of loss and proof of interest in the said ———." &c.  
"In case of loss, the same to be paid L. K. Bridge.

The declaration contained two counts on the policy, both alleging the lading of the goods and merchandise on board the brig *Mary*, and the loss of the vessel and cargo by perils of the sea, on the 21st day of February, 1827, on her voyage from Carthagena to New-York: one count averring the interest to be in Amos Foster; the other in Amos Foster and John B. Calcagno.

There were also general counts of *indebitatus assumpsit* for work and labour: for money lent and advanced: for money paid and expended: for money had and received, and upon an account stated.

The defendants pleaded the general issue; and at the trial admitted that a bill of lading and invoice of 802 hides, 50 tons and 1332 lbs. of fustic, ten sacks of ipecacuanha, six hundred and forty *castillanos* of gold dust, twelve hundred and forty-two Spanish dollars, five hundred and thirty-six dollars in old gold, three thousand six hundred dollars in Columbian doubloons, shipped by Charles Dean on board the *Brig Mary*, (F. Desaque Master,) to be delivered at New-York to the shipper on board, or his order, and dated on the 16th and 18th days of February, 1827, had been duly presented to them by the plaintiff among his preliminary proofs, on the 17th of July following. Attached to the invoice was an affidavit of the plaintiff, dated on the 19th of May, 1827, showing that the effects described in the bill of lading were the joint property of Amos Foster and J. B. Calcagno, and that no other person had any interest in the same.

The defendants also admitted, that an affidavit of *Charles Dean* (the consignee of said goods, who was on board the vessel at the time of her loss) sworn to before the American Consul at Carthagena, setting forth the particulars of the shipwreck of the *Mary*, on the 21st day of February, 1827, had also been duly presented by the plaintiff among the preliminary proofs. This affidavit

stated, that the vessel was cast away on the coast of South America, on a shoal or rock called, "*Baño Nuevo*;" that the crew, together with the deponent, proceeded in the boat for the main land, taking with them all the gold dust, doubloons, and dollars which had been shipped on board the brig. That they reached that part of the main land called the "Musquito Shore," and then attempted to proceed to St. Johns, by keeping along the coast; but owing to the difficulties in their way, they were compelled to haul the boat upon the shore, bury the dollars in the sand, and distribute the gold and gold dust about the persons of the deponent and the officers of the vessel, for safe carriage, and to prosecute their journey on foot. That while on their way, two of the seamen gave out, and were left behind; but the deponent, the master, and the rest of the crew afterwards arrived at Corn Island, where a small vessel was chartered, in which the mate went back to the place where the dollars were buried, in pursuit of the men and the money left behind. On his arrival there, he found, by some lines written on a slate by one of the two seamen, that they had launched the boat, taken the dollars on board, and proceeded down the coast in pursuit of the master, supercargo, and crew: but these seamen were never heard of again, nor was the money ever recovered. Every exertion was made to save the vessel and cargo, and nothing but absolute necessity induced them to leave the dollars buried on the shore. The captain, deponent, and crew afterwards arrived at St. Johns, and there a regular protest was made, detailing the loss of the Mary.

The plaintiff then proved, by the deposition of Dean, and the testimony of other witnesses, that the goods specified in the invoice and bill of lading, were shipped on board the Mary; that they belonged to Mr. Foster and John B. Calcano jointly, and that the vessel was lost as stated in the foregoing affidavit. He also proved the execution of the policies, and that the plaintiff had been the agent of Amos Foster in New-York since the year 1826, and had frequently effected insurances for him. It also appeared that Dean was a clerk in the employment of Foster, (who was a general commission merchant at Carthagena, and in the constant habit of making shipments to New-York,) and that the property

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saved from the wreck (amounting to \$3,661 and seven reals,) was delivered to the plaintiff.

The plaintiff also read in evidence a letter from himself to Foster, dated on the 17th of February, 1828, (and which was received by him on the 12th of March following,) containing the following sentence: "The insurance for Mr. Fabre will be attended to, *and you may calculate on having a policy on your own account for \$5000 on merchandise or specie, by vessel or vessels, so that you may ship with safety as to insurance.*" The news of the loss of the *Mary* reached Carthagena on the 18th of April, 1827.

The defendants, on their part, did not question the occurrence of the disaster, nor the correctness of the preliminary proofs, otherwise than that they were not such as would entitle the plaintiff to interest, even if he should recover. But the defence was placed upon the grounds, that the defendants *never became insurers on the cargo of the Mary*. That Foster had given orders for insurance in Nov. 1826, to be effected on the *Bunker-Hill* or *Athenian*. That under those instructions the policy had been effected, and it did not apply to the cargo of the *Mary*: for the insurance of which, Foster had given instruction to a Mr. Benjamin Marshall.

The defendants then called upon the plaintiff to produce two letters from Foster to the plaintiff, one dated Nov. 28th, 1826, the other on the 23d of March, 1827. The plaintiff's counsel declined to produce those letters, upon the ground, that they had once been furnished to the defendants, who had taken copies of them.

The defendants then proved and read a copy of the first letter in evidence, which was as follows:

"Carthagena, 28th of Nov. 1826.

MR. L. K. BRIDGE,

*Dear sir*—I wrote you *per Bogota*, requesting you to insure for \$3000, more or less, for and on account of Mr. Augustus Fabre, of Marseilles. I write this for fear the *Bogota* may meet with an accident, and I now wish you to open a policy for me, *as I expect to ship some cash to you by the Bunker-Hill or Athenian.*



when she comes in, to be forwarded to Mr. N. Foster. Please insure, as value may appear on either vessel."

(Signed) AMOS FOSTER.

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The plaintiff's counsel then insisted, that the second letter of the 13th of March, 1827, was also to be considered as given in evidence by the defendants, and the presiding judge ruled the point in his favour. This last-mentioned letter, after speaking upon a variety of subjects of business, concluded as follows: "I intended to have shipped some hides to Mr. Judd by this vessel, as a remittance, but could not get them ready. *Shall do so by the Athenian*, which leaves this port in all of a week." "For the insurance on policy of \$5000, you will consider, that I have shipped in the name of *Mr. Charles Dean*, or whom it may concern, on board of the brig *Mary*, 11,000 dollars of produce and specie consigned to him. She left this on the 17th of February, and I trust she has arrived. *If not, you will notify the insurers of the circumstance of her having the property on board.* You will ascertain by calling on *Mr. Benjamin Marshall*, to whom I had written to have 11,000 dollars insured, and for fear that you had not made the policy for the \$5000, induced me to write to him to effect for \$11,000. Now, should she have arrived safe, or if Mr. Marshall has effected the insurance as requested, and she lost, or not in, you will then consider that \$5000 of the property, or more, if so expressed in the policy; and if the vessel is in safe, you may cancel the policy, and charge the expense to my account."

These two letters contained all the orders, which the plaintiff had received from Mr. Foster to make insurance, and all the information which he had on the subject. It appeared that the defendants, on the 24th of January, 1827, had effected another policy in the usual form for the plaintiff, from which the following is an abstract:

"Cargo. By the Niagara Insurance Company of New-York. L. K. Bridge, on account of whomsoever it may concern, do make insurance, and cause to be insured, lost or not lost, at and from Carthage to New-York, upon all kinds of lawful goods and

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"merchandises, laden or to be laden on board the good vessel or  
"vessels," &c. "the said goods, &c. hereby insured, are valued at  
"———," having been paid the consideration for this insurance  
by the assured or assigns, at and after the rate of one and three  
quarters per cent. on specie or merchandise, (subscribed) "*twenty-*  
"*five hundred dollars.*" The premium paid on this policy was seven-  
ty-five dollars, and on the same, there was the following memo-  
randum :

"It is agreed that \$290 shall be considered as insured on this  
"policy at and from New-York to Carthagera, in *brig Bunker-Hill*,  
"captain *Smith*, at one and three quarters per cent., and that the  
"same shall, when safely arrived, be considered as closing this po-  
"licy. New-York, 29th March, 1827."

The plaintiff then produced two bills of lading in evidence, da-  
ted on the 12th of January, 1827, at Carthagera, signed by  
Charles R. Shipman, master of the brig Athenian, acknowledg-  
ing the shipment of Spanish dollars, by Amos Foster, on board of  
said vessel, to be delivered to the plaintiff at New-York, he pay-  
ing one per cent. freight. One bill of lading was for one thou-  
sand dollars, and the other for one thousand and ten dollars.

The defendant closed his defence by reading the following let-  
ter from Mr. Foster to Benjamin Marshall :

"Carthagera, 15th February, 1827.

"MR. BENJAMIN MARSHALL, New-York—

"*Dear Sir*,—I now take the liberty of requesting you to  
"effect insurance on account of Mr. Charles Dean, or whom it  
"may concern, on ten thousand (say \$10,000) in gold, silver,  
"hides, fustic, and specie, (an invoice of which will go forward  
"by the vessel,) or as value may appear, on board of the Herma-  
"phradite brig Mary, of Philadelphia, formerly of New-York,  
"captain F. Desauque, which leaves this on or about the 20th  
"instant, as she is now loading. I should send you a draft on  
"my former correspondent for amount of premium, but as the vessel  
"and cargo will be consigned to you by Mr. C. Dean, who goes out  
"in the vesel, I think you will have no objection to advance the

"*amount*. I write this to go by the way of Jamaica and Santia-  
"go de Cuba, and hope it will arrive in time."

On the recommendation of the judge, a verdict was taken by consent for \$4,500 in favour of the plaintiff, subject to the opinion of the court upon the case, and an adjustment of the loss by Mr. O. H. Hicks, under the direction of the court, with liberty for either party to turn the case into a bill of exceptions.

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The cause was now argued by *Mr. D. Lord* and *Mr. D. B. Ogden* for the plaintiff, and by *Mr. Geo. Griffin*, for the defendants.

For the defendants, it was contended,

I. That from all the evidence in the case, it appeared that the plaintiff was never authorized by Mr. Foster to effect *any* insurance on his account, except by his letter dated the 26th of November, 1826. An insurance, in obedience to that order, for \$2500, was effected by the plaintiff: but that insurance was intended to cover a shipment by the *Bunker-Hill* or *Athenian*, consigned to Foster; and it could not be applied, without the consent of the assurers, to a *different shipment*, consigned to a *different person*. [*Phil. on In.* 59, 60. 63, 64.] If the first insurance was made by virtue of the letter dated in November, then the letter had performed its office; it was *functus officio*, and could not be received for any other or a different purpose.

The letter of the 26th of November authorized an insurance on *cash*, consigned to Foster, and the first insurance was on cash. But the subject lost, consisted of an assorted cargo of hides, fustic, ipecachuana, dollars, gold, gold-dust, &c., consigned *nomi- nally* to *Charles Dean*, but in reality to Benjamin Marshall. Besides this, Mr. Foster never authorized an insurance in the *form* adopted by the plaintiff, who has seen fit to make the loss, if any, payable to *himself*, and now brings the action in his own name.

II. But suppose that the policy was not made under the letter of November 26th; the plaintiff in that case cannot recover, because the policy was then made without *any authority*, and there

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has been no subsequent ratification of the plaintiff's acts by Foster, the real party in interest. The plaintiff himself cannot recover in his own right, for he has no interest in the subject; and if the insurance was made for another without his authority or knowledge, and if the agent's acts have not been adopted by the principal, then the agent cannot recover in behalf of his principal.

The plaintiff does not pretend to have had any express original authority to effect insurance on the cargo of the *Mary*, nor does he prove any *general* authority to effect insurances for Foster. The presumption of such authority is taken away by the letter from Foster to Marshall, in which he directs *him* to effect the insurance.

No general agent has any authority *a priori*, to effect insurances for his principal, which will bind him, without his subsequent assent. If there be a ratification of the act, then it will be good, because the principal will be bound. Suppose that the plaintiff in this case had paid Foster's money to the defendants, and that Foster had repudiated his acts; could not Foster have recovered his money back from the defendants?

There can be no *presumption* of a ratification in such a case, but the ratification must be explicit and *unqualified*. It must adopt the whole act; for the principal is not at liberty to select that which may be beneficial, and reject the part which may be injurious. As between the principal and his agent, the rule may be less rigid; but as between the principal and third persons, it goes to this extent.

In this case, Foster has never adopted the act of the plaintiff in any explicit or unqualified manner. He had heard of the insurance on the 23d of March, 1827, and in his letter to the plaintiff of that date, instead of approving of his conduct in direct and explicit terms, he makes a fraudulent attempt to *avail himself of the policy in case of a loss*, and to evade the premium in case the vessel had arrived in safety. If the vessel had been safe, he would have charged the plaintiff with the premium, and would have disclaimed his act. The letter is framed with a studied and fraudu-

lent ambiguity, applicable to any state of facts, and the court cannot consider it as any ratification of the plaintiff's acts. If then, the policy was made without authority, and if the conduct of the plaintiff has not been ratified by Foster, there can be no recovery in this case. The law will not permit a stranger without interest to effect insurances for third persons without their approbation and knowledge, which shall be binding upon the parties. The contract is not binding upon the assured, and it cannot be enforced upon the assurers.

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III. The recovery in this case, if any be had, can be only for a partial loss, and there can be no allowance of interest.

1. There was no *abandonment*, and there is no proof of a total loss; but on the contrary, the evidence is positive, that a part of the cargo, amounting to \$3,681, was saved and delivered over to the plaintiff. The recovery, therefore, must be for an amount to be adjusted by the referee.

2. There can be no just claim for interest. It was the duty of the plaintiff to have liquidated his claim, when he presented his preliminary proofs; for these proofs are mere matter of notice to the defendants. Interest would accrue after a demand and notice of the amount claimed; but here there were no materials put into the defendant's hands, by which they ever could have made up the amount of the loss, but all the proof is vague and uncertain. The defendants could not tell the amount to be paid, and there cannot, therefore, be any allowance of interest. [1 *John. Rep. B. 15. 5 Cowen's Rep. 587.*]

Mr. Lord and Mr. Ogden *contra*, contended,

I. That the policy in suit was not effected for the purposes directed in Foster's letter, of the 28th of November, 1826, nor under its particular authority. The order contained in that letter was carried into effect by the policy of the 24th of January, 1827, which was satisfied. There was no shipment to which the present policy could be applied, except that by the Mary. The letter from Foster, dated in November, directed an insurance for \$3000, more or less, for *Fabre and himself*, or cash in the Bunker-Hill, or

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Athenian, as value might appear in *either* vessel. Under that order the policy for \$2500 was effected, by which \$2210 were insured on the Athenian, and by the memorandum on that policy the remaining \$290 were transferred to the Bunker-Hill. The Athenian and Bunker-Hill both arrived in safety, and the first policy was fully satisfied.

The policy in suit, therefore, could not have been made under that title; it was for a different amount, and had no reference to the particular subject of that insurance. In the absence of all proof, that the policy in suit was effected under the authority and order of Foster's letter, the fair inference is, that the first insurance fulfilled all the objects of that letter, and was made in direct reference to it. The plaintiff in his letter of advice to Foster, dated February, 17th, 1827, made no mention of an insurance, on account of previous orders, but says expressly, that he has effected an insurance for \$5000, on vessel or vessels, under which Foster can thereafter safely ship his property to this country.

The most that is proved upon the subject is, that the plaintiff stated to the underwriters after the loss, that the letters contained all his orders upon the subject of insurance. This shows, perhaps, that the present policy was effected without orders, but does not show that it was effected in obedience to the letter of November, 1826. It may, therefore, be considered as demonstrated, that the first policy was the one effected under that letter, and that Foster's orders relative to that subject were obeyed, and the objects of all parties answered by that insurance. If the policy has once been applied to any particular subject, then we admit, that it cannot be subsequently applied to another; but we totally deny that the policy in suit has ever been applied to any property except that on board the Mary.

II. The policy in suit, whether made with or *without* orders, took effect upon the property of Amos Foster at risk, at and from its date: it therefore attached to the cargo of the Mary.

What policy of the law is there which forbids A to make insurance for B, without orders, provided the name of the real party in interest appears upon the face of the policy? Why may not

one gratuitously insure for another? The underwriter cannot complain, for he receives the premium, and understands the contract precisely when it is made; and he in general reduces it to writing.

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In this case, the policy was fairly made without fraud; the subject of the insurance was correctly described; the name of the real party in interest was disclosed; the defendants received the premium; the subject was put at risk, and was lost. Why then should not the defendants fulfil that contract of indemnity, which they deliberately made for a valuable consideration?

When A makes a contract for the *benefit* of B, the law will presume an assent on the part of B, until the contrary appears. [1 *Pow. on Con.* 138. 1 *Fonb. Eq.* 206.] And if one man make a contract for the benefit of another, the latter may adopt it when the *contingency arrives*. [*Hagedorn v. Oliverson*, 2 *Maule & Sel.* 485. 13 *East*, 274.] In such case A is taken by the law to be the agent of B, and the latter may enforce the contract. [1 *John. Rep.* 139. 3 *Bos. and Pul.* 148. note (a) 10 *Mass. R.* 287.]

III. The policy in suit was effected by the plaintiff as the agent of Amos Foster, a general commission merchant, who was in the habit of making shipments constantly; it was intended to be applied to shipments on his account, and he, by his letter of the 23d of March, 1827, adopted the act of the plaintiff in making the policy.

The evidence shows these facts, and the insurance was made in the most general form by the agent for the benefit of his principal. It was not upon any specific property, but upon the property of Amos Foster generally, to be shipped from Carthage to New-York. No particular vessel was named or intended, as the object was to cover a particular amount of property on board any vessel. The act in itself was both prudent and proper, and the agent gave immediate notice of it to his principal. The principal on the 23d March wrote to the agent approving his conduct, and adopting his act.

The letter, it is true, is not as clear and explicit as might be desired; but the ambiguity arises from the fact that the actual con-

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tingency was not clearly within the view of the principal. He did not doubt, that Marshall had effected the insurance, and his mind was turned towards a return of the premium in that case. One thing is certain, that at the date of that letter, he had not heard of the loss; for if he had he would have adopted the plaintiff's act without hesitation. The letter then was written in good faith; Foster supposed himself chargeable with the premium, and desired that if the vessel were not in, or if Marshall had not insured, that then this policy should stand. But if the vessel was in, or if Marshall had fully covered his property, he did not wish to pay two premiums for one risk, and under these views he wrote the letter.

Could he after this, if the vessel had arrived in safety, have disclaimed the act of the plaintiff, and recovered back the premium from the defendants, or the plaintiff? If Foster intended to repudiate the act of Bridge, he was bound, both legally and morally, to state his objections when he heard that the insurance was effected. Not having done this, but on the contrary having approved the act, and given directions for further proceedings upon the subject, Foster never could have maintained an action for the premium against any body. Not against his agent, for he had adopted his act; and not against the defendants, for they had earned the premium, the property having been at risk.

IV. The defendants, being bound to pay the loss in thirty days after the proof of interest and loss, are chargeable with interest, after thirty days from the 17th of July, 1827; and the salvage being in the hands of the captain, they are as much chargeable with notice of the amount as the plaintiff. [*Com. Dig. Pleader, c. 75.*]

This is not a case of unliquidated damages, for the amount becomes certain, when the salvage is deducted from the amount of the invoice. But this is a positive contract to pay by a certain day, and a jury can even in cases of *partial* loss give interest. [*Anon. 1 John. Rep. 315.*] The rule for interest should depend on the default of payment, and if the defendants are *liable to pay*, why keep the plaintiff from his money for two years, without com-



pensation? [*The Renss. Glass Factory v. Reid & Cowen's* Dec. Term, 1828.  
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OAKLEY, J. This is an action on an open policy of insurance, dated the 19th of February, 1827, on goods, &c. laden, or to be laden on board any vessel from Carthagená to New-York, on account of one *Foster*, who resided at Carthagená. The defence rests on two grounds: 1st, That the policy never attached upon the goods which were lost, and for which the plaintiff seeks to recover; and secondly, that if it was intended to cover such goods, it was never in fact consummated so as to become a binding contract on the defendants.

Under the first branch of the defence it is contended, that the policy was made by the plaintiff, in pursuance of the orders contained in the letter of *Foster* to him of the 28th of November, 1826. In that letter the plaintiff is directed to open a policy on cash, to be shipped from Carthagená, by the Bunker-Hill or the Athenian. The cash so shipped by the Athenian arrived; and if the policy in question was made for the purpose of covering that adventure, it is quite clear, that it cannot now be applied by the plaintiff or *Foster*, to any other vessel or cargo, though coming within its general terms. On the part of the plaintiff it is contended, that a policy dated the 24th of January, 1827, and also made by the defendants, was the one opened by him, in pursuance of the directions contained in that letter; and without going into a detail of the facts of the case, it is sufficient to say, that I consider that the proof satisfactorily shows, that the position assumed by the plaintiff is the true one.

It appears, then, that the policy in question in this case was opened by the plaintiff, without any orders from *Foster*, with a view to cover any shipment to be made by him, coming within the general terms; that such a shipment was made in the *Mary*, and that a partial loss of the cargo has taken place; and the question now is, whether the policy of the 19th of February is binding on the defendants.

It seems to be well settled, that a contract for the benefit of a third person, without his knowledge or authority, is a binding

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contract on the promissor, and may be enforced by him for whose benefit it was made. [*Schemerhorn v. Vanderheyden*, 1 John. R. 139. 3 Bos. and Pul. 149. n. *Arnold v. Lyman*, 17 Mass. 400. 10 Mass. 287.]

It can therefore be no objection to the policy in question, that it was made without any instructions from Foster; for the plaintiff was Foster's agent generally, and had been in the habit of frequently making insurances for him. The defendants, having made this policy, and received the premium, cannot be permitted to show any want of authority in the plaintiff to act for Foster. It follows, therefore, as a necessary consequence, that the defendants are bound, unless Foster has *disaffirmed* the act of the plaintiff in such a manner as to discharge them from the contract. It appears that Foster, by a letter dated at Carthage the 5th of February, 1827, gave directions to one Marshall to effect an insurance of \$10,000 on the cargo of the Mary, then about to sail for New-York. The plaintiff, on the 17th of February, wrote from New-York to Foster, that he intended to effect a policy on his account generally for \$5000, so that he might make any shipment with safety. On the 23d of March following, Foster wrote to the plaintiff that he had made a shipment by the Mary, and he instructs the plaintiff, if the vessel had not arrived, to notify the insurers that she had the property on board. He further directs him to ascertain from Marshall, whether he had effected any insurance on the vessel, and if he had, or if the vessel had arrived safe, he was instructed to cancel the policy, and charge the expense to his account.

Such I understand to be the purport of Foster's letter, and it amounts to a conditional affirmance of the act of the plaintiff in effecting the insurance. He declares his willingness to consider the policy as effectual if the vessel had not arrived, and his disposition to abandon it, if there had been a previous insurance, or if the vessel was known to be safe. This conditional ratification may not have been altogether consistent with honesty and good faith: but the question is, whether it was such a disaffirmance of the contract made by the plaintiff, as to discharge the defendants from its obligations. The contingency on which the plaintiff was

instructed to consider the policy as effectual, actually happened ; the vessel had not arrived when Foster's letter was received, nor had *Marshall* effected any insurance on her. It can scarcely be questioned, under such a conditional ratification of the contract, if the vessel had subsequently arrived safe, that the defendants would have earned the premium, and that it could not have been recovered of them by the plaintiff or by *Foster* on the ground that the policy had never attached. If the policy, then, became binding on *Foster*, or the plaintiff, I see no reason why it should not be held to be binding on the defendants. The intention of *Foster* to cancel the policy in certain events, which did not happen, cannot, I think, be construed a fraud on the defendants, so far as to release them from their contract, when they had fairly assumed the risk, and had received the premium for it.

I think that the plaintiff is entitled to judgment, the amount to be adjusted as is provided in the case.

*Judgment for plaintiff.*

[D. Lord, *Att'y for the plff.* G. W. Strong, *Att'y for the defl.*]

*Note.*—The Court decided, that the loss in this case was a partial one merely, and that the plaintiff was *not entitled to interest*. The underwriters could not make up the amount of the loss from the proofs before them ; they could not ascertain the sum to be paid ; and where the plaintiff's preliminary proofs are thus defective as to the *amount* of the loss sustained, it would be inequitable to charge the defendants with interest.

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*versus*

ALFRED SETON AND FREDERICK E. BUNKER.

One partner may execute in the name of the firm an instrument under seal, necessary to the usual course of their business, which will be binding upon the firm, provided an authority for that purpose be previously communicated to him by the co-partner. But this authority need not be by an instrument under seal, nor in writing, nor specially communicated for the specific purpose; but may be general, and inferred from the partnership itself, and from the subsequent conduct of the co-partner, implying an assent on his part to the act of the partner, who executed the deed.

The defendants, (who were partners,) by an instrument under seal executed by *one* in the name of *both* chartered the whole of a vessel (except the cabin) of the plaintiff, for a voyage from New-York to Angostura, and were by the terms of the charter-party to be allowed *one* passenger. Two passengers, however, were sent out in the vessel by the defendants; and in an action of covenant brought upon the charter-party, it was *HELD*, that the instrument was well executed; but that the putting of the *two* passengers on board was not such a breach of the covenant, as would allow the plaintiff to recover the amount of the *passage money*, for the extra passenger, in this form of action. If entitled to recover at all, he should resort to an action of *assumpsit*, either against the passenger, if he had not paid for his passage, or the defendants, if they had received the amount of the *passage money*.

THIS was an action of covenant, upon the following charter-party.—“Chartered from N. B. Gram, the brig *Fancy*, Miner  
“master, for a voyage from hence to Angostura and back, for the  
“sum of twenty-seven hundred and fifty dollars: twenty-five  
“running lay-days to be allowed at Angostura to discharge the  
“outward and receive the homeward cargo, and twenty dollars  
“per day demurrage for detention over that time. The said N.  
“B. Gram agrees to pay all the customary port charges to the  
“vessel belonging. The whole vessel chartered, excepting the  
“cabin and usual room for provisions:—*one* passenger allowed  
“the charterers—he finding his own small stores—vessel’s provisions at his service; *other passengers* may be allowed the *Captain*, but no freight excepting their baggage.

“The necessary amount of disbursements at Angostura to be  
“advanced if required, free of commission; balance of charter

"payable on arrival here. The vessel to leave this on or before  
 "the sixteenth inst. or demurrage for detention over that time, at  
 "the rate per day as above stated. For the true and faithful  
 "performance of all the above, each party binds himself to the  
 "other in the penal sum of three thousand dollars, *As witness our*  
*"hands and seals.* Dated in New-York, 7th day of October, 1825.

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(Signed) SETON & BUNKER, [L. S.]  
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 DAVID MINER, [L. S.]

"Two days for detention to be allowed for loading in New-  
 "York, at demurrage above; should the vessel leave Angostura  
 "two days *less* the twenty-five, then the detention here is to be  
 void.

(Signed) NEILS B. GRAM.

The declaration alleged, that the charter-party was made between the *defendants*, the plaintiff and the said David Miner, and made *proport* of the instrument in these words:—"which said  
 "charter-party of affreightment *sealed with the seal of the said*  
*"defendants*, and of the said plaintiff and David Miner, the said  
 "plaintiff now brings here into court." It then counted upon the covenant in general terms, setting forth the substance of the charter-party, and averring a full performance of all its terms and conditions on the part of the plaintiff. The breaches assigned were, first the non-payment of the twenty-seven hundred dollars, or any part thereof, either at Angostura or New-York.

II. That the vessel did not leave the port of New-York on her said voyage, on or before the 16th day of October, A. D., 1825, according to the tenor and effect of the charter-party, but that she was detained there for the space of *seven days* thereafter, and that the defendants had not paid the plaintiff demurrage at the rate of twenty dollars per day, for the detention.

III. That upon and during the voyage aforesaid, *two passengers* were put on board the said vessel by the defendants, and conveyed from New-York to Angostura "*contrary to the form and effect of the*

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*said charter-party;* "By reason whereof the said plaintiff was "obliged to provide and furnish" "stores and necessaries of all "kinds" for the "subsistence and use of one of the said passengers" during the voyage aforesaid, &c.

The defendants pleaded, first, *non est factum*; secondly, payment of the said sum of twenty-seven hundred and fifty dollars.

The cause was tried before *Mr. Justice OAKLEY*, at the term of August, 1828. At the trial it appeared, that the signature of *Seton & Bunker* attached to the charter-party, was in the handwriting of *Seton*, and that *Bunker* was absent at Angostura, (where the house of *Seton & Bunker* was established,) at the time it was executed. It also appeared, from the deposition of *Miner*, (which was read in evidence,) that two persons (a *Mr. Gorden* and a *Mr. Barretto*) went out as passengers in the vessel; one of whom (*Barretto*) found his own small stores, but the other was entirely supplied from the provisions of the ship and the stores of the captain. Before the vessel sailed, *Seton* told *Miner*, that there would be a passenger besides the one mentioned in the charter party; and they agreed that \$60 would be a fair charge for his passage, if he found his own stores. *Seton* promised to put on board stores for the additional passenger, and said he would write to *Bunker* to settle all matters, as to his passage, at Angostura. *Seton*, however, did not write to *Bunker* upon the subject, neither did he put in stores for *Gorden*; and when payment was demanded for his passage of *Bunker*, he declared that he knew nothing of the subject. Upon the return of the vessel to New-York, the captain demanded payment of *Seton*, who replied, that the matter should have been settled at Angostura, because *Gorden* went out as a clerk for the firm at that place.

*Miner* further testified, that the vessel sailed from New-York on or about the 19th of October, 1825, and was consigned to *Seton & Bunker*, at Angostura; that on her arrival there, *Bunker* received the cargo and furnished another in return. The charter-party was seen by *Bunker* at Angostura, and the vessel remained there but twenty-two days. The port charges of the vessel at Angostura were paid by *Bunker*, and when he was ap-

plied to by the Captain for an account of those charges, *he said he would send it to Seton, as that was the regular way.*

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Upon these facts, the defendants moved for a non-suit, upon the ground, that *the evidence did not prove the execution of the agreement by Bunker*, and if proved, *that it varied from the declaration.* This motion was overruled by the presiding judge. The defendant then introduced testimony as to the demurrage, the fair price of a passage to Angostura, &c., the payment of the \$2,750, as stated in his plea, and rested his case.

The judge charged the jury, that they might *infer a general authority* in Seton to execute such instruments under seal for himself and Bunker, as were usual and necessary to the business of the firm, from the partnership itself, and the *subsequent acts and assent of Bunker.* That it was not necessary for the plaintiff to show that Bunker had given Seton a special authority to execute the charter-party in question, for if they believed, *from all the circumstances*, that Bunker had given his partner a *general authority* to execute for him such instruments *under seal*, as were usual and necessary in their business, such evidence would be sufficient to establish the execution of the charter-party against Bunker.

To this direction, the counsel *for the defendants* excepted.

The Judge also charged the jury, that the plaintiff *could not recover in this action the sum claimed for the additional passenger.* If entitled to recover it at all, the plaintiff must resort to an action of *assumpsit* for that purpose against the defendant, if they received the passage money, or against the *passenger himself*, if he had not paid for his passage. To this direction of the judge, the counsel for the *plaintiff* excepted.

The jury found a verdict for sixty-three dollars in favour of the plaintiff.

*Both parties* now moved for a new trial, and the cause was argued by *Mr. James Oswald Grim*, for the plaintiff, and by *Mr. Tallman* and *Mr. Ogden Hoffman*, for the defendants.

For the plaintiffs, it was contended,

I. That the authority from Bunker to Seton to execute the  
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II. It was not essential to the plaintiff's case that the authority in question should refer to this identical charter-party. If it was an authority to execute all papers under seal, which their business necessarily required, it was sufficient. [1 *Chit. Plea.* 115. 2 *Co. Lit.* 231. a. 2 *Rolls Abr.* 63. *Com. Dig. tit. Covenant A. Shep. Touch.* vol. 1. 177. *Skinner v. Dayton*, 19 *John. Rep.* 513. *Brutton v. Burton*, 1 *Chit. Rep.* 707. 2 *Stark. Rep.* 378.]

A new trial, however, is due to the *plaintiff*, because,

III. The taking of more than one passenger was a breach of the charter-party.

IV. But whether it was so or not, was not a matter for the consideration of the court and jury *at the trial*. It had been assigned in the declaration as a breach of the covenant, and if improperly assigned, the question should have been presented by demurrer. [2 *Saund.* 181. b. *Ib.* 366. (n. 1.) *Browning v. Wright*, 2 *Bos. and Pul.* 13. *Pomfret v. Ricroft*, 1 *Saund.* 321. *Pordage v. Cole*, *Ib.* 319, 320. *Ib.* 322. a. (n. 2.) 1 *Salk.* 138. *Anon. Cro. Eliz.* 685. 1 *Chit. Plead.* 643.]

For the defendants, it was contended,

I. That the execution of the agreement by Bunker, one of the defendants, was not proved. [*Clement v. Brush*, 3 *John. Cas.* 181. *Green v. Beals*, 2 *Caines' R.* 254. 1 *Holt's Rep.* 141.]

II. That the evidence of the execution of the agreement did not support the declaration.

III. That the judge erred in charging the jury, that they might infer a general authority in Seton to execute the instrument for Bunker, from the partnership and subsequent acts and assent of Bunker, and that it was not necessary for the plaintiff to show a special authority for that purpose.



JONES, C. J., delivered the opinion of the court.

This is an action of covenant on a charter-party of affreightment of the brig *Fancy*, Miner, master, for a voyage from New-York to Angostura and back, to recover of the defendants, as the charterers, the stipulated freight, and further demands for demurrage and passage money.

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The defendant craved *oyer*, and then pleaded *non est factum*, and payment of the stipulated freight money. The evidence in support of the latter plea does not appear in the case, yet it must have been proved or admitted, for the verdict of the jury is for \$63 only, which could not be for the freight of the vessel. The defendant avers, in pleading, that the freight has been paid; the verdict of the jury is in accordance with that averment, and as the plaintiff does not complain of the finding of the jury on that ground, I must assume the fact to be so. It is only important, however, in its bearing upon the merits of the defence under the other issue, by which the defendants deny the execution of the charter-party by them; and this opens the great question between the parties. It appears that Gram, the plaintiff, who was the owner of the vessel, let her to freight, for the voyage in question, to the defendants, who were co-partners in a house of trade, under the firm of Seton & Bunker, established at Angostura, Seton acting as agent of the firm, at a stipulated freight, with certain reservations; and under an agreement for demurrage, in case of delay, in lading and discharging at the outward and homeward ports, beyond the times agreed upon and allowed for that purpose. The defendants had the use of the vessel for the voyage. She was loaded by Seton at New-York, with a cargo consigned to Bunker at Angostura, which was received by him there, and a return cargo put on board of her by him, with which she returned to New-York. But the charter-party, which turns out to be an informal instrument, under seal, more resembling a memorandum or note of an agreement, afterwards to be reduced to form, than a deed of charter-party, is signed on the part of the defendants by Seton, with the co-partnership-name of "Seton & Bunker;" and it appears that Bunker, the other partner, who resides at Angostura, and conducts the business of the house at that place, was not present

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at the time. On this supposed defect in the execution of the deed, the defence hinges. And the charterers, after having had the whole benefit of the charter, and after having acted upon the contract, with full knowledge by both parties of its form and contents, and after full payment of the freight in conformity to its tenor, to repel a further claim to an unimportant amount, avail themselves of the technical objection of the want of authority in Seton to bind his co-partner by seal to avoid the demand. The judge, who tried the issue, ruled, that the jury might infer a general authority in Seton to execute for Bunker from the co-partnership, and the subsequent acts and assent of Bunker; and that a special authority to execute this charter-party need not be shown; but that if they believed from the circumstance, that Bunker had given Seton general powers to execute for him all instruments which, according to the usage of their business, were necessary to be executed under seal, it would be sufficient to establish this charter-party against Bunker, and he so charged the jury. Under this charge, the jury found a verdict for the plaintiff. The defendants excepted, and now move for a new trial on the ground, 1st. That no proof was given of the execution of the charter-party by Bunker; and 2d. That the judge misdirected the jury.

The principle, that a partner cannot, by virtue of the authority he derives from the relation of co-partnership, bind his co-partner by deed, has been too long settled to be now shaken. It is the technical rule of the common law applicable to deeds, which has been engrafted into the commercial system of the law of partnership; and unless the charter-party in question can, under the circumstances of this case, be construed to be the deed of Bunker, the defence must prevail. The reasons for the restrictions are not very satisfactory: for all the mischiefs, which the expositors of the rule ascribe to the authority of members of a co-partnership to seal for their co-partners, may flow almost as extensively, and nearly with equal facility, from the use of the name and signature of the co-partnership. The dangers of allowing the use of a seal to the members of a co-partnership, are supposed to consist in these two attributes of the seal: that it imports a consideration, and that it is competent to convey absolutely, or

to charge and encumber real estate. But negotiable paper, by which the partner may bind the firm, equally imports a consideration with a seal; and upon general principles, the use of the seal of the co-partner, equally with the signature of the co-partnership, would, if permitted, be restricted to co-partnership purposes and co-partnership operations solely; and the joint deed of the co-partners executed by the present for the absent members, be held competent to convey or to encumber the copartnership property alone, and to have no operation upon the private funds or separate estate of the co-partners. With these restrictions upon the use and operation of the seal, is not the power of a partner to bind his co-partner, and to charge and encumber his estate, as great and as mischievous, without the authority to use the seal of the absent partner, as it would be with that authority? Those powers undeniably place the fortune of the members of a general co-partnership, to a great degree, at the disposal of any one of the co-partners; but it is necessary to the beneficial management of the joint concern, that extensive powers should be vested in the members who compose it; and when the copartners live remotely from each other, their joint business concerns cannot be advantageously conducted or carried on without a latitude of authority in each, which is inconsistent with the perfect safety of the other co-partners. It cripples the operations of a partner, whose distant residence precludes a personal co-operation, to deny him the use of the seal of his co-partner for instruments requiring it, and which the exigencies of their joint concerns render expedient or beneficial to them. He must be clothed with the power to execute deeds for his co-partner when necessarily required, for the purposes of the trade; and if that authority is not inherent in the co-partnership, it must be conferred by letter of attorney, and it must be general, or it will be inadequate to the ends of its creation. A co-partnership, especially, which is employed in foreign trade, and has occasion to employ ships for the transportation of merchandise, or to borrow money on *respondentia*, if its members are dispersed, as is often the case, must be seriously embarrassed in its operations by the application of the rule that requires every co-partner, who is to be bound by the charter-party or the respon-

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*dentia* bond, to seal it personally, or by attorney duly constituted for that specific purpose, with his own seal. Similar difficulties would arise out of the same rule, when the operations of the house required the co-partnership to execute other deeds. Can it then be, that this stern rule of the common law, which has its appropriate sphere of action, and a most salutary operation on those relations of society where men, not otherwise connected, are the owners of undivided property, is to be applied in all its force, and to govern, with unbending severity, in the concerns of co-partners, whose intimate connection and mutual interest require such large power and ample confidence in the integrity and prudence of each other, to give to their operations efficiency, vigour, and success?

The pressure of these considerations has induced a relaxation of the common-law-rule, to adapt it to the exigencies of commercial co-partnerships, and other associations of individuals, operating with joint funds for the common benefit. The rule itself remains; but the restrictions it imposes are qualified by the application of other principles. The general authority of a partner, for example, derived from his relation to his co-partners does not empower him to seal an instrument for them so as to make it binding upon them without their assent, and against their will. This is the fair import of the modern cases, and is, I apprehend, the principle courts are disposed to apply to the use of a seal in joint contracts for co-partnership purposes. An absent partner is not bound by a deed executed for him by his co-partner without his previous authority or permission, or his subsequent assent and adoption. But the previous authority or permission of one partner to another to seal for him, or his subsequent adoption of the seal as his own, will impart efficacy to the instrument as his deed; and that previous authority or subsequent adoption may be by parol. These are the results which I deduce from the judicial decisions, especially those of our own courts on the subject; and if I am correct in my deduction, the conclusion must be favourable to the validity of this charter-party, as the deed of both the partners.

When the question first arose in the courts of law, it would seem to have been contended, that each of the parties to a deed

must actually seal it personally, or by an attorney constituted by him by deed for that express purpose, to make it binding or obligatory upon him. And that the principle applies equally to personal contracts as to the transfer of interest in land. But that rule, if it ever did prevail, was soon relaxed. So early as the time of Charles I., in 1632, it was stated by the king's attorney in Lord Lovelace's case, [*Sir Wm. Jones' Reports*, 268.] as settled law at that day, that if divers men enter into an obligation, and they all consent and set but one seal to it, it is a good obligation of them all; and on that ground in the principal case, the roll being sealed with but one seal, he said, "if one of the officers of the forest put one seal to the rolls by the assent of all the Verderors, Regarders, and other officers, it is as good as if every one had put his several seal." This principle, that one may seal for another by his consent, appears by that case to have been familiar at that day. It may be traced to times of high antiquity. And in modern times it was judicially settled in the case of *Ball v. Dunsterville* and another, 4 Term, Rep. 313. that a bill of sale purporting to be the deed of two co-partners, but sealed with the seal of one of them for and on behalf of himself and the other, and by the authority of the other, is the deed of both: In that case it appeared, that the defendants were partners in the transactions, and that one of them executed the deed in the presence of the other, and by his authority for them both; but there was but one seal, and it did not appear that he had put the seal twice upon the wax. The court was clearly of opinion, that it was a good execution by both. The Reporter adds, it is true, that the court relied principally on the circumstance, that the deed was executed in the presence of the party for whom it was sealed by the other. In that particular, that case differs from this; for Bunker was absent at the time of the execution of this charter-party. The case, however, fully establishes the principle, that a partner may execute a deed for his co-partner by the authority and consent of such co-partner, and that one seal will suffice for both. It is in point also, to show that the authority and consent of the partner, for whom the deed is executed, to the partner who executes it for him, may be by parol. One of the objections taken on the part

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of the defendants to the sufficiency of the execution of the bill of sale in that case, was, that the authority given by the one to the other, to execute the deed, was by parol, and that such authority ought to be conferred by deed. But the court disregarded the objection, obviously deeming it of no weight or importance. The principle of that case was recognised by the highest court of this state in the case of *Ludlow and others v. Simond*, 2 *Caine's Cases in Error*, 1. 42. 55., where the agreement was executed on the part of the Ludlows (as this charter-party is by these defendants) in the partnership name, and with but one seal. An exception was taken to the execution, but the court, on the authority of Lord Lovelace's case, and the case of *Ball v. Dumsterville*, held the execution good. They put it on the ground, it is true, that the evidence was sufficient to show, that both the partners were present at the time of the execution and assented to it. And it cannot be disguised, that stress was laid by both the learned Judges, who adverted to this feature of the case, upon the presence of the party for whom the deed was sealed, at the time of the execution. But I am not able to discover any additional efficacy, which his actual presence could give to the execution beyond his consent and concurrence in the act. His presence simplified the proof of that consent and authority to his co-partner; and in that view of it, was an important ingredient in the case. But it was the consent and concurrence of the party, and not his presence, which imparted efficacy to the seal affixed by his co-partner for him as his seal; and his presence alone, unless under such circumstances as to imply an assent to the act, could be of no avail. Assuming, then, that the deed derived its virtue and binding force from his consent and concurrence in the act of his co-partner, that consent and concurrence, if established by proof, must surely be equally efficacious, whether the party was actually present or not. The difficulty, in every instance, is in showing that the absent partner did in fact give his consent and concurrence to the particular deed in question by his co-partner, for him, and as his deed.

This appears to me to be the sound sense of the rule; and such I understand to be the exposition given by the Supreme Court of

this state to the rule of *Ball v. Dunsterville*, in the case of *Makay v. Bloodgood*, 9 Johns. 285., which may be considered as the next case in order. In that case, the action was upon an arbitration bond, in the usual form, subscribed by one of the defendants with the name of the firm, and sealed with one seal, thus, "J. & L. Bloodgood [L.S.]" The testimony was, that the bond was executed by L. Bloodgood, who alone signed the name of the firm, and affixed the seal; that the other partner was not actually present when the bond was so signed and sealed, but that he saw the bond before it was executed, and approved of it; and that the partner who afterwards executed, told him that he would execute the bond for both of them, to which he consented. It appeared that he was about the store at the time of the execution, but was not actually in the room when the bond was signed. Upon these facts the argument was, that to make the deed obligatory, both the obligors must sign and seal it; and if one executes for the other, his authority to execute must be by deed. But the court held the case to come within the principle of *Ball v. Dunsterville*. One of the partners, it was observed, sealed the bond for himself and his co-partner, with the consent of his partner, and after the partner had seen and approved of the bond, and while he was about the store at the time of the execution. This evidence, say the court, was sufficient to carry the cause to the jury, and to justify them in finding it the deed of both. What was to be left to the jury to find?—The fact, that the party who sealed had the parol authority of his co-partner to seal for him.

This, then, was the case of a deed executed by one partner for himself and his co-partner, with the consent and concurrence of the co-partner, but not in his presence; and the evidence was held sufficient to justify the jury in finding it the deed of the absent party. One of the witnesses, it is true, does state that the partner whose seal was affixed by his co-partner for him to the deed, was about the store at the time of the execution; and the court by throwing that circumstance into their opinion, may be supposed to attach some consequence to it. But that witness expressly states, that he does not recollect that that party was actually in the room when the bond was signed; and another witness,

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(who was also present at the execution of the bond,) testified positively to the absence of that party, at the time the bond was signed and sealed by the executing partner ; and who is the only witness to prove that the party who did not seal the bond, saw, and approved of it, and authorized his co-partner to seal it for him. That witness was one of the arbitrators ; he was confessedly a credible witness, and his testimony to the point is clear and positive. The fact, therefore, of the absence at the time of the partner, for whom the bond was sealed by the executing partner, was fully and conclusively established. Consequently, the efficacy of that signature and seal as the act of the absent party by his authorized agent, could not depend in any degree upon the presence of the principal ; but must result wholly from his previous consent (with full knowledge of the purport of the bond,) to the execution of it for him by his co-partner. And if the consent and concurrence of a partner to the execution of a deed by his co-partner for him gives effect to the seal affixed to the deed for him by the co-partner in his absence, as his seal, the time which may intervene between the act and the previous consent, or the distance of the contracting party from the place of execution, cannot be material, as long as the relation between the parties and the nature of the joint employment continue unchanged, and no express or implied revocation of the authority and consent of the absent partner is shown. If, then, the authority to execute may be by parol, the whole controversy might be considered as resolving itself into a question of evidence, upon the fact of the authority of Seton to seal for Bunker. The cases already cited certainly tend to establish the principle, at least with us, that the authority of a partner, in the course of his co-partnership transactions, to seal a deed for his co-partner, to which that co-partner has consented, is not required to be by deed ; and the subsequent cases of *Skinner v. Dayton* and *others*, and *Randall v. Van Vechten*, would seem to recognize and sanction the rule. But those cases have a material bearing upon the whole merits of the question before us, and are well entitled to our attention. The case of *Skinner v. Dayton* and *others* arose in the Court of Chancery, and was finally decided in the Court for the Correction of Errors, 19 *Johns.* 513. In that case



the agreement purported in the body of it to be between White, Taylor and White, of the one part, and Reuben Skinner, William Raymond, Jun., and Abner Hitchcock, as Directors of the Granville Cotton Manufacturing Company, of the other part; and the persons named as parties of the second part, engaged in behalf of the Company, to pay to White, Taylor and White the sums of money mentioned in the agreement. But the agreement was signed and sealed by Skinner alone in this manner: "For the Directors, Reuben Skinner. [L. s.]" An action at law had been brought upon this contract in the Supreme Court of this state, by White, Taylor and White against Skinner alone, for three instalments of the moneys stipulated by it to be paid to them; to which action he had pleaded *non est factum*, and a special plea in bar that the deed was executed by him in his capacity of director and agent for the company, and not otherwise, or in any other capacity whatever; to which special plea the plaintiffs demurred. The court gave judgment for the plaintiffs on the demurrer, upon the ground that the defendant was bound to *aver and prove* that he had authority to seal for his co-directors. It appears that leave was given to the defendant in the action at law to amend his plea, by setting forth his authority to contract with the plaintiff. He, however, did not avail himself of that permission; but elected to seek relief in equity. The bill was against all the parties in interest, and enjoined the suit. The objects of it were to have the damages upon the covenant liquidated upon principles of equity, and to compel the co-partners to contribute to the satisfaction of what might be assessed for damages therein. The pleadings and proofs disclosed the circumstances under which the contract was made, and the subsequent acts of the company, which were relied on as a satisfaction and ratification of it by them. The Chancellor [5 *John Chan. Rep.* 351.] was of opinion, that there was not the requisite evidence that the other co-directors ever authorized the making of the contract, and that the subsequent acts and assent of certain of the directors were no ratification by the company at large of the contract; and he on those grounds declared, that there was no well-founded pretence on the part of the complainant of a right to

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call on the company at large, or on any individual of it to contribute to the damages which White, Taylor and White might recover against him; and he refused to grant the relief sought by the bill. But the Court for the Correction of Errors reversed the decree, on the ground that the agreement was authorized, or had been ratified by the directors, and by all the members of the company, except Nathan Doane who, it was said, had forfeited his shares and as to whom the bill was dismissed with costs; and it was held that all the members of the association except Doane were chargeable as partners with the liabilities growing out of the contract, and bound to contribute to the payment of the damages recoverable for the non-performance of it, and that the injunction against the judgment at law should be continued until such contribution should be settled and made; and a decree based upon those principles was sent to the Court of Chancery to be executed.

This case was cited by the defendants' counsel, as distinguishing between the liability of the principal, and the remedy against him in such cases, by reason of his own acts or admissions, and his liability and the remedy against him, upon the contract of the agent; and as establishing upon that distinction the rule, that the covenant of the agent, for benefits to the principal within the scope of the agency, may create a liability of the principal in respect of the benefit, which equity may enforce; but that the agent's seal cannot change the principal with the covenant so as to give an action at law against him. Senator HOPKINS does appear to incline to those views of the case; and he holds the equity of the complainant to be against the joint funds of the company, and that there was no remedy against the individual members as co-partners; but none of the judges concur with him on that point; and he, while he holds those opinions upon the equity of the case, admits in clear and strong terms, that the subsequent ratification of the contract is a fact from which assent and participation at the time may be, and ought to be, inferred. And if that position be correct, upon our view of its bearings, it would bring the case within the principle, which

allows a remedy on the contract against all the parties, who assented to it at the time, whether it was sealed by them personally, or by their agents for them. The judges, whose opinions are reported, all put the reversal upon the previous authority of Skinner as agent, to make the contract for the company, or upon the subsequent ratification and adoption of it by the company: ascribing the same legal effect to the previous authority, and the subsequent adoption, in charging the members of the company as co-partners with the obligation of the contract, and in imposing on them the duty, and entitling the complainant to the right, of contribution to the damages recoverable against the complainant, for the non-performance of the engagement. They differed in opinion as to the remedy and form of pleading, by which the rights of the complainant, and the obligation of his fellow-members of the company, were to be enforced; but they all concurred in the opinion as to the liability of the company.

Judges PLATT and YATES agreed with the Chancellor, that there was not the requisite evidence that the co-directors authorized the making of the contract; and they thought that the subsequent acts of the directors and company could not in that case authorize a presumption of previous assent; and on those grounds they inclined to the opinion, that neither the directors nor the company were chargeable with an action at law upon the covenant. But Chief Justice SPENCER thought it clearly proved that Skinner, the appellant, made the contract with the direct approbation and consent of Raymond, one of the co-directors, and that it was subsequently made known, assented to, and ratified by the other directors, and by all the stockholders, except Doane, who had previously forfeited his shares. And he expressed a decided opinion that both at law and in equity, the subsequent assent of the principal to the act of an agent in relation to the interest and affairs of the principal, is equivalent to a positive and direct authorization to do the act; that such subsequent assent is an adoption of the act of the agent: and his conclusion was, that the company was bound by the contract; and he held the covenant to be the contract of the directors, and that the di-

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rectors, acting for the company, as their agent within the scope of their authority, were not personally answerable; but that the covenant they entered into was the contract of the company, on which White, Taylor, and White had a legal remedy against the individuals composing the association. The same principle was in effect established by the Supreme Court in the case of *Randall v. Van Vechten and others*, (19 John. 60.) to which Chief Justice SPENCER refers as applicable to the case before him, and governing its decision. Randall, in that case, brought an action of covenant on an agreement made with him by the defendants, who were a committee appointed by the corporation of the city of Albany for that purpose; and by which the plaintiff engaged to survey the city, and to make maps, profiles, &c., and the defendants promised to pay the plaintiff the sums mentioned in the agreement for his services, and to make him reasonable advances. The defendants signed their names and affixed their seals individually to the agreement, but were known and understood by the plaintiff to contract with him for the corporation; and the acts and resolutions of the corporation were produced, showing their assent to, and ratification of, the contract. The principal question was, whether it was a personal covenant binding the defendants individually, or a contract which bound the corporation. The court held, that the defendants having acted as agents for the corporation, and not in their own right, were not personally bound, but that the engagement was to be fulfilled by the corporation; and that the sealing of the contract by their agent did not absolve the corporation from the obligation to perform; and they expressed a decided opinion that the plaintiff had a remedy by an action of assumpsit upon it against the corporation, and that the committee were not personally liable. In this case, the form of the remedy against the principals appears to have been the most embarrassing question. It was objected, that the assumpsit was merged in the specialty, and yet it could not be the covenant of the corporation, as the corporation seal was the only organ by which the body politic could covenant, and the seals of the agents were, in no sense, the seal of the corporation. But the answer was, that the rule of merger did not apply; for the corpo-

ration had not affixed their seal to the contract, and as to them it was a simple agreement in writing by their agents for them, upon which assumpsit would lie. A distinction was taken between a corporation and an individual contracting by agent, and it was said that the seal of the agent could not represent the seal of the body corporate, whose deeds must have the corporation seal; but that the seal of an agent of an individual is in law the seal of his principal; and that, therefore, the form of action against the principal, in the case of a corporation, is not determined by the form in which the agent contracts; but that in the case of an individual, the form of action must correspond with the form of the contract, whether by seal or simple contract. This distinction shows that covenant would have been the proper form of action on the agreement of the agent, if the principal had been an individual, and not a corporation.

It is admitted, that in *bankruptcy* one partner may execute a deed in behalf of himself and his co-partners, which will be binding upon both. This, however, is allowed to be an exception to the general rule; but it is an exception under which the rule is dispensed with, in the case to which it applies; and if one partner binds another without his copartner's consent, he alone, by his single signature and seal, for and in the name of the firm, gives validity to the deed without the previous authority or subsequent adoption of the absent partner. Yet it is an exception, which has not been introduced by statutory provision, but which owes its origin to the great inconveniencies it obviates, and rests upon the sanction of usage, and its own great intrinsic merits for its support; and it is co-extensive in its application with the necessity which gave it birth. It shows, that the general rule does yield to the force and pressure of circumstances, and may be relaxed to avoid inconveniencies, without a violation of principle. So it has been held that a warrant of attorney, executed by one partner for himself and his co-partner, in the absence of the co-partner, but with his consent, is a sufficient authority for signing judgment against both; and the assent of the absent co-partner, which ratifies and confirms the deed, may be subsequent to, and need not precede or accompany the execution; the principle is,

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that the assent of the absent partner to the deed amounts to an adoption of the seal.

And is it too bold a proposition to hazard, that as between partners who are identified in interest, and co-equal in their powers, a seal affixed by either to the signature of the firm may, by the previous authorization or subsequent assent and adoption of the other, be in judgment of law the seal of each, so as to make the instrument the deed of all the members of the co-partnership, who thus give it their assent and concurrence?

In the case of *Halsey v. Fairbanks and Whitney*, 4 *Mason*, 206. where the action was assumpsit by a creditor against the principal debtor, and his trustee, under an assignment for the benefit of creditors, for the recovery of the debt out of the funds assigned the trustee on the ground of the insufficiency of the assignment to protect the property of the debtor in the hands of the trustee from the claims of the creditor: one point was, that several of the creditors, who had signed and sealed the assignment being partners, had executed the instrument with a single seal in the co-partnership name of the firm, and not in the individual names of the partners; which form of signature and execution it was insisted was irregular and inoperative in law, and on that ground it was contended that the claims of those creditors must at all events be deducted from the amount to be retained by the trustee in virtue of the deed. Judge STORR acceded to the principle, that one partner could not bind another by deed without his assent, but held that a signature and sealing in the name of the co-partnership with a single seal is good, and binds all the partners who are present, or assent to the execution. So in the case of *Henry Darst and others v. Roth*, 4 *Wash. C. C. R.* 471. the declaration was in covenant, and stated that Henry Darst and two others who were named with him in the declaration as plaintiffs in the suit, by the name and description of Henry Darst & Co., entered into an agreement with the defendant, under their respective hands and seals, whereby the plaintiffs agreed to sell to the defendant certain lands in the state of Ohio, for which the defendant agreed to pay a stipulated price. The plea of *non est factum* was interposed. At the trial the agreement was offered in evidence, and it appearing when pro-

duced to have the signature and seal of Henry Darst & Co., and of the defendant, but not to be signed and sealed by all the members of the firm of Darst and Co., individually ; the counsel for the defendant objected to it as inadmissible, contending that it was the deed of Henry Darst only, and not the deed of the other plaintiffs and of the defendant, as stated in the declaration. To this it was answered, that the execution of the deed by one of the plaintiffs by the direction of or with the assent and concurrence of the others, though evidenced by their subsequent ratification, made it the deed of each of the plaintiffs ; and that the assent was to be proven by the evidence the plaintiffs yet had to offer. And Lord Lovelace's case, and the cases of *Ball v. Dunsterville*, *Mackay v. Bloodgood*, and *Skinner v. Dayton*, were cited and read by the plaintiff's counsel, as supporting their propositions. Judge WASHINGTON declared, that the cases which had been read, abundantly proved, and he decided that the execution by Henry Darst, one of the partners and owners of the land, with the consent of the other two partners and owners, made it the deed of the three ; and although there was but one seal, yet that was, in point of law, the seal of each of them ; and he ruled, that upon proof of the consent and concurrence of the other two in the execution by Darst, (if such proof was necessary, and the joining in the suit was not of itself sufficient for the purpose,) the agreement was good evidence to go to the jury. The concurrence of the other two in the execution by Darst, was proved, and a verdict was rendered for the plaintiffs. Now it is manifest that the learned judge was strongly inclined to the opinion, that the fact of the two co-plaintiffs joining with Darst in the suit, was of itself sufficient proof of their assent and concurrence in the deed ; and the further evidence offered by the plaintiffs of such concurrence, was the subsequent ratification of the agreement by them. Darst did not pretend to be allowed by deed to seal for the other partners and owners of the land. These cases appear to me to establish principles, which apply to the case now before us. The charter-party in this case was executed by one of the defendants for himself and the other defendant, his general co-partner. It was for the charter of a vessel, to be employed for legitimate co-partner-

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ship purposes. The contract was seen by the absent partner at Angostura, where he resided, and he, with full knowledge of it, received the outward cargo of the ship which was consigned to him, and shipped the return cargo on board the chartered vessel, under the charter-party, and in conformity to its provisions, without any objection on his part to the form of the contract, as a partnership engagement. Was not the judge right, then, in charging the jury, that they would be justified by these facts, in concluding that Bunker, the absent partner, had authorized Seton to execute the deed? If the act was unauthorized, and he intended not to be bound by it, would he not have repudiated the charter, or have expressed some dissatisfaction or complaint? He must have had full knowledge of the charter-party, for it was the title of the partnership of which he was a member, to the ship for the voyage. It was the compact which was to govern him, and to regulate his conduct in regard to the ship, and from that source alone could he acquire information as to the time he was allowed to detain her, and the port to which she was to be sent. He cannot be allowed to take shelter under the plea of ignorance, for he was chargeable with full knowledge of the existence and contents of the instrument. Under these circumstances, was not his silence a tacit acknowledgement of the authority of his partner to enter into the charter-party, and his acts in receiving, supplying, and employing the chartered vessel, and shipping the return cargo under the charter-party, a recognition of the contract, and a full ratification and adoption of it by him? This subsequent recognition amounts to a ratification of the contract; and it was a fact from which the jury might well infer a previous authority in Seton to contract by seal for the co-partnership. [19 *John*. 571.]

The power of Seton to bind his co-partner by contracts without seal, for purposes within the scope of the co-partnership employment, is not contested; and it is impliedly admitted, that the employment of this vessel for the voyage and adventure upon which she was sent by Seton, was authorized by the terms of the co-partnership. It is equally clear that Seton was the acting partner at New-York at the time, and the agent there for Bunker, his absent co-partner. Indeed, that fact could not be denied, for the



acts of both partners conclude them upon the point. It follows then, that, upon the principles already settled by the Supreme Court and the Court for the Correction of Errors in the cases I have cited, the co-partnership was bound by the obligation of the contract of Seton as partner and agent of the firm; and both partners having each in his appropriate sphere concurred in reaping the fruits of the charter-party, and enjoying the benefit resulting from the use of the vessel, must both be bound to pay the consideration agreed to be given for the use of her. The only question, that can be made, is upon the form of the remedy upon the contract—whether this action of covenant against both is maintainable, or covenant against Seton alone, or a bill in equity against the co-partnership, was the proper form of the suit? The only objection to the action in its present form, is the technical effect of the seal. For if the partnership-name had been subscribed by Seton without a seal, there could have been no objection to the validity of the contract, or to an action of assumpsit against both the co-partners upon it. But, if an authority to contract for a partner by seal in his absence, may be conferred by him upon his co-partner by parol, and if the fact of such authority being given may be inferred from other facts, there can be no solid objection to an action of covenant on this contract against both partners; for the jury have found that Seton had authority to seal the deed for Bunker, and the seal affixed by Seton by that authority to the co-partnership-name, must consequently be in law the seal both of himself and of his partner. I have endeavoured to show that, whatever may have been the ancient law, it is now the settled rule that an authority to execute a deed for co-partnership purposes, may be conferred by one partner upon another by parol; and the cases to which I have referred appear to me to confirm the position. In the case of *White and others v. Skinner*, 13 John. R. 307., the plea was held to be bad, for the want of the averment of an authority to Skinner, from his fellow-directors or the company, to contract for them by seal; and in the subsequent case of *Randall v. Van Vechten and others*, the court held, that the evidence of the agent's authority supplied the defect in the plea in the prior case, and was sufficient to charge the

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principals with the contract and to exonerate the agent from personal liability. Yet the authority was not shown or required to be by deed. So in the case of *Skinner v. Dayton and others* in equity, where the whole case was disclosed and the principals held answerable for the contract of the agent as made by their authority, no vestige of an authority by deed is found. The ratification and adoption by the company was by resolutions, letters, and acts; and the previous consent of one of the co-directors was by parol. Yet stress is laid on these acts and on this parol consent by the court; and it is distinctly admitted that the right to contribution would have been imperfect without that proof. Chief Justice SPENCER expresses a decided opinion that the evidence was sufficient to exonerate the agent, and to support an action on the covenant against the individuals, who composed the association; and if the other Judges, whose opinions are reported, incline to the opinion that the members of the company could not be sued at law in an action of covenant on the contract, it is because there was not, in their judgment, the requisite evidence to show an authorization of the agent to bind his associates by a seal; and that such an authority would not in that case be inferred from their subsequent adoption of the contract. There was another reason, which might have weighed with those, who held that an action at law against the company was not a competent remedy in that case. White, Taylor and White, themselves, with whom the contract was made by the agent, were associates and fellow members of the company, and in a suit on the contract against all the members they would be proper parties defendants. Besides, the contract was for joint account, and they were bound to contribute to the damages they themselves would recover in the action at law. The incongruity and intrinsic difficulties of a suit at law, in which the same person would be both plaintiff and co-defendant, probably conduced to the preference of a suit in equity, which would be free from that embarrassment. However that may be, my judgment upon the merits, aside from the question of form, I confess, leans to the views taken of the case by the Chief Justice. It seems to me, that where the obligation of the contract is held to bind the principal as made by his authority or adopted by him, the remedy against him upon it must

be the same as if it had been executed by him. I discover no solid distinction between the previous authorization of the act or contract of the agent, and the subsequent ratification and adoption of it by the principal. If the agreement is in the name of the principal, and the law charges him with it as his contract, an action of covenant must lie upon it against him ; for the adoption makes the seal affixed to it by the agent, the seal of the principal. And this I understand to be the doctrine of the case of *Randall v. Van Vechten* and others. There, the previous authority to the agents to contract by seal, if there was any such authority, did not appear ; but a subsequent ratification and adoption of it was fully proved. It is assumed by the court, that the appointment of the defendants by the corporation as their agents, for the purpose of contracting with Randall for the survey, was conceded at the trial ; but it was the agency only that was admitted, and not the authorization by deed to contract by seal. Whether the appointment of the committee was under the corporate seal or by resolution does not appear ; and in the absence of such authority, the consent or approbation of the common council was shown. It must have been the ratification and adoption of the the contract by the common council that bound the corporation to a performance of it ; and we have the authority of Chief Justice SPENCER, who presided in the court at the time, and concurred in the decision, for saying, that the court put the decision principally upon the recognition, adoption and ratification by the corporation, of the contract of the agents. The court in that case held, that the corporation were liable at law, upon the contract made by the agents, (though subscribed by them and sealed with their own seals,) by reason of the adoption of it by their principals, and that the agents were not personally answerable. It was not competent to the corporation to adopt the seal of the agents or to bind themselves by deed, otherwise than by the corporation seal ; and, therefore, they were held to adopt the contract without the seal, and to be chargeable in assumpsit. But if the party to be charged had been a natural person, his adoption of the agent's contract would have made the agent's seal his own ; and the action would have been in covenant on the deed ; and so the

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court declared. This case was free from the embarrassments, which surrounded the other; for Randall was a stranger to the corporation, and not a partner with those whom he was to sue. The whole benefit of the recovery against them would belong to him; and he would not be liable to contribute to satisfy his own verdict.

In these cases of *Randall v. Van Vechten* and *Skinner v. Dayton*, to which I have so often referred, the sufficiency of the agent's authority to bind the principal by deed, was involved in the questions which came before the court. In both cases, the contract of the agent was under seal, and it did not appear in either case, nor was it pretended, that the agent was authorized by deed to seal for the principals. If a special authority by deed was indispensably necessary to empower him to seal for them, the absence of all proof of such an authorization would have been conclusive against the liability of the principals. How then are we to account for the absence of any exception to the agent's authority on that ground? Must we not conclude that the objection was not taken because it was believed to be untenable? If so, the counsel and the learned judges must have been of opinion, that an authority by deed was not required to enable the agents to seal for their constituents. In the case of *Randall v. Van Vechten*, the proof was, that the common council, by several formal resolves, recognized, adopted, and ratified the contract of the committee; and the court held, that the evidence was sufficient to show, that the committee, being the agents of the corporation, had lawful authority to bind their principal according to the terms of the agreement. Mr. Justice PLATT, who delivered the opinion of the court, observes, that it was not made a point at the trial, whether the corporation had originally appointed the defendant their agent for making the contract; and he says, that the court must presume, that if the point had not been tacitly conceded, a formal power of attorney, or at least a resolution of the board of common council for that purpose, would have been shown. He does not intimate any necessity to presume an authority by deed, but declares, that it would make no difference whether the agents for the corporation were appointed under the corporate seal, or by a resolution in the minutes. It may, he says, be legally done either way; and yet a resolution of a corporation is not a deed,

any more than a letter of instructions of an individual. In *Skinner v. Dayton*, on appeal from the Court of Chancery, the judges divided upon the sufficiency of evidence to show an authority in Skinner to enter into the contract for the company; but the point that his authority to be valid must be by deed, (which, if tenable, must have been conclusive of the question,) was not taken by either of the learned judges, who expressed opinions against the sufficiency of the evidence to prove the authority. The authority, if any, was from Raymond and Hitchcock, the two co-directors, who, with Skinner, the president, constituted the board of directors, and were virtually vested by the articles of association with the power of transacting all necessary business. They denied, in their answer, that the contract was made with their approbation or consent, and the proof of their approval and concurrence was, the declaration and admission by Raymond of his implied consent given to Skinner to make the contract, and the recognition of the contract by Hitchcock, as obligatory upon the company. It was apparent upon the face of this evidence, that the agent could not have authorized by deed to contract under seal for the principals, and the inquiry into the evidence of his authority to bind the company by the contract in question, was a virtual admission of the sufficiency of a parol authority for the purpose; for in that view alone could the inquiry be material. Mr. Justice PLATT indeed expresses the opinion, that one of the associates, admitting them to be partners, could not bind his co-partner by a seal without special authority, but he does not say, nor intimate, that the authority to seal must be by deed. Mr. Justice YATES, while he states the law to be that one person cannot seal for another without express authority, admits that the authority may in some instances be by parol, and he refers to the case of *Ball v. Dunsterville* as an example of such an authority by parol. Chief Justice SPENCER held, that a subsequent assent is an adoption of the act of the agent, and equivalent to a positive and express authorization to do the act; and he adds, that the ratification and adoption of the contract of Skinner by the respondents in that case, gave White, Taylor, and White a good ground of action upon it, against the individuals composing the

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association. And HOPKINS, senator, agreed, that the subsequent negotiation of the contract of Skinner, by the act of the president and directors in making the assignment to which he refers, amounted to a ratification, and was a fact from which assent and participation at the time might be and ought to be inferred. He was of opinion, that Skinner, having contracted as the agent, was not personally bound; but that the contract was made or ratified by the directors—the proper agents of the company—and was binding not upon the individuals as such, but upon the company in its collective capacity; that is upon its funds. The Judges held it binding upon the individuals composing the company, which opinion prevailed; and they were, on that ground, held liable to contribution. These cases, then, certainly countenance, if they do not in terms adopt the principle, that the authority of an agent to seal for his principal may be effectual, without the formality of a power by deed. And my conclusion is, that as between partners, the principal who adopts and ratifies the deed, which his co-partner, in virtue of a parol authority to affix his seal, has executed for him, on the principles in operation with us, makes the seal used by the agent his own, and becomes liable to an action of covenant upon the contract, as his own deed; and upon that ground, if my views of the evidence of adoption are correct, this action is maintainable against Bunker conjointly with Seton, whether the authority of the latter to contract for the former by seal was expressly proved or not. The previous authority was, if necessary to satisfy the forms of law, to be inferred from the subsequent assent and adoption; and under that aspect of the case, the charge of the Judge, if incorrect, would not vitiate the verdict. The error is upon an immaterial point and could not mislead the jury; and a misdirection under such circumstances is not a sufficient ground for a new trial. But again, this charter-party was a contract for the lease or hiring of the vessel for a voyage, by the plaintiff to the defendants, for a stipulated freight and demurrage, as the consideration of the grant. The absent partner accepted the charter of the brig, understandingly and with full knowledge of the charter-party, which professed to confer the title of the vessel for the voyage upon him and his co-partner, as the charterers. This

charter-party, under which the defendants assumed upon themselves the temporary ownership of the vessel, and employed her for their commercial operations, contained the covenant on their part for the payment of the consideration or freight and demurrage, upon which this suit is now brought. What then was the legal effect, of this acceptance of the title and of the actual possession, use and employment of the vessel, by both the partners under the charter, upon the operation of the covenant of the charterers to pay the consideration? Can it be that one of the joint purchasers, who takes the benefit of the purchase under a deed to both, may refuse to pay the consideration which that deed reserves, or because he has omitted personally to seal the deed, or that one partner who may be solvent, shall throw upon another who may be insolvent, the obligation which has been incurred by a contract in the usual course of trade, in their co-partnership name, and for their mutual benefit, and to which both of them have by their acts acceded, merely because the co-partner, who made the contract, has used a seal in the contract by which the agreement was consummated? The principle that the acceptance and enjoyment of an interest under a deed, which is sealed by one of the partners, (but which the other does not seal, but enters under it and agrees to it,) will charge both with the covenants it contains for the payment of the stipulated condition, is not novel in our law. In contracts affecting real estate, it was settled in times of high antiquity, that the acceptance of an estate under a deed of conveyance or a leasehold interest under a lease, bound the grantee or lessee, who did not seal the counterpart to the conditions annexed to the grant, and to the covenants that run with the land.

And Lord Coke in his commentary upon Littleton, 2 *Co. Lit.* 231. puts the case of a lease by indenture to two lessees; one of whom seals the counterpart, and the other does not seal but enters and agrees to it; and he was held chargeable in covenant for a sum in gross (which he was bound to pay to the plaintiff in case that certain conditions comprised in the indenture were not performed) by his acceptance of the lease; and because he was not joined in the action the writ abated.

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And in the report of *Brett v. Cumberland*, in 2 Roll. Rep. 63., a case, (which I suppose to be the same with that to which Lord Coke refers,) is put, as cited from the Year Books, where *three* men were enfeoffed by deed, and in the deed there were covenants on the part of the feoffees, and two of the feoffees only sealed the deed; yet as the third feoffee entered and agreed to the estate conveyed by the deed, he must be joined in a writ of covenant with his companions. I find no case which corresponds precisely with this citation in its circumstances: but the principle appears to have been extracted from a case in the 38th year of Edward III., fol. 8. of the Year Book of that reign, which is probably the authority also upon which Lord Coke puts the case before cited, from his commentary on Littleton. It was an action of debt upon an indenture, and the plaintiff alleged in his count, that he had, by the indenture, leased to the defendant a manor for a term of years, and in the same deed, the tenant covenanted and became bound to the plaintiff in £20, in case certain conditions comprised in the indenture were not performed: and the action was for the £20. The indenture was found, on oyer of it, to purport to lease the manor to the defendant, and one R., who appeared on the face of the deed to be a party to it, and it was objected that R. was in life, and not named in the writ; to which it was answered, that R. had never put his seal to the deed; and therefore was not a party to the deed, and the plaintiff had no good writ against him for the payment; but the writ abated. On the argument, Thorpe propounded as a settled rule, that if land be leased to two for a term of years, and one put his seal, and the other agree to the lease, and enter and take the profits with him, he shall be charged with the payment of the rent, albeit he did not put his seal to the deed. To the correctness of this rule, Finch acceded; but he drew a distinction between the payment of rent and a sum in gross, contending that his agreement made him a party to the lease, and liable to the payment of the rent; but if there had been a condition contained in the deed, which was not parcel of the lease—as a sum in gross payable by it—if he put not his seal to the deed, although he was a party to the lease, he is not a party to the conditions. But the judgment of the court was, that the



writ should abate ; whereby the distinction of Finch was overruled, or the liquidated sum of £20, as the penalty for the breach of the condition, was not deemed such a sum in gross as to bring the case within it. In any view of the case, if there be any just analogy between agreements affecting real estate, and those which relate to chattels, the principle it establishes must have an important bearing upon this ; for in this case, the charter-party was avowedly between the plaintiff and the co-partnership of Seton & Bunker ; it was sealed by Seton with the co-partnership-name for the co-partnership, and it was accepted, and the vessel employed by Bunker under the contract. And if that acceptance and enjoyment does not bind Bunker, as one of the charterers and party to the deed, to the payment of the freight and demurrage, which were the consideration of the charter and parcel of the charter-party, it must be because a different rule applies to a lease or grant of a chattel interest from that, which is applicable to a lease of land. I know of no principle, which calls for such a distinction, and no precedent has been shown to establish it.

The rule established by the case cited from Coke on Littleton, and the principle of which is found in the year books, has, I believe, never been overruled or shaken. Its foundation is laid on the agreement which the acceptance of the lessee imports, and which his fruition of the benefits of the estate obliges him, by the immutable principles of justice, to observe and perform. And, at this day, I apprehend, that one of two lessees who does not seal the lease, but enters and enjoys the estate, would be liable at law with the lessee, who seals upon covenants running with the land in the indenture to which he is a party, and which he agreed to and accepts, and under which he so enters and has the possession. Can it be necessary to look further for a principle of law to sustain the present action ? Can any resemblance be more perfect than the analogy between the lease of a freehold for a term, and the charter or letting to hire by deed of charter-party of a vessel for a voyage ? The only difference between the two contracts, is, that the subject of the one is real estate, and the subject of the other is a chattel interest. And will it be contended, that the technical rules of the common law, which require the actual sealing of the deed by

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the party, to make him answerable in an action of covenant upon it, is more unbending in its application to personal contracts than to deeds of lands? If a party, who is named in a lease as one of the lessees, but who never seals the lease, is nevertheless bound by his acceptance of the estate to the performance of a covenant for the payment of a sum in gross to the lessor, for the use of the land, and liable to an action of covenant on the deed in case of default of payment, must not one of two charterers, who never seals the charter-party, but takes the ship, and performs the voyage with her under the contract, be equally bound (and upon the same principle,) for the payment of the freight and demurrage stipulated by the deed to be paid by the charterer for the use of the ship, and be equally liable to an action of covenant upon it in case of default? The principle is, that the enjoyment of the grant by the grantee who does not seal it, and his acceptance of the estate or interest he acquires by it, make him equally a party to the deed with the grantee who does seal it, and oblige him also to the performance of the conditions and the observance of the covenants, which constitute its consideration, or form a part of the terms upon which the interest was granted.

These principles apply with peculiar force to the case of partners, where the partner who seals the deed has a joint interest with the party for whom he seals; and the legal consequences of a different rule, furnish an additional reason for holding them both liable: for the contract, if not the deed, of both the co-partners being in law the deed of him who sealed it; the joint assumpsit, which the law would have raised upon the joint benefit of it to the co-partnership, would be merged in the specialty of the one co-partner, and no remedy be left against the other co-partner for the payment or consideration reserved or made payable by the contract, except perhaps in equity upon the acceptance. In mercantile operations, such a rule would be peculiarly inconvenient and manifestly unjust. If the co-partnership take a store upon lease to transact their business, and both are named as lessees, but one of them only seals the counterpart, and the other agrees to it, and they occupy and enjoy the store conjointly, under the lease it is seen that covenant will lie against both for the rent.


And this, upon the privity of contract, and the force of the seal of the one to bind the other. Would it not be strange, then, that when a ship is taken by two co-partners upon charter for a voyage, and both are named as charterers, but one only seals the deed, and the other agrees to it, and concurs in the use and employment of the vessel under it, the remedy upon it for freight and demurrage, which compose the consideration of the charter, and are of the essence of the contract, and a condition of the grant of the vessel for the voyage, should be against that partner alone, who sealed the charter-party? And if in any case the seal of one covenantor can be construed to enure as the seal of his fellow-covenantor, so as to create a privity of contract with the other contracting party, and give a remedy against both upon the covenant, the charter of a ship for a voyage at a stipulated freight, by one of the co-partners in trade, with the consent and concurrence of the other, must come within the rule.

This analogy between the charter-party and the lease, to be complete, requires that the absent partner should agree to the charter-party; adopt it, and freely co-operate and concur with his co-partners in the operations under it, as the contract of the co-partnership: he must have the option upon full knowledge, or with the means of knowing the nature and purport of the deed, to accept or reject it. And with this security to him against the abuse of his seal, what danger does he run? His own acceptance and adoption being requisite to make the seal, his partner affixes, his own, if he is dissatisfied with the contract, he may refuse or decline to agree to the deed; or his protest against it, (to manifest his dissent and refusal to accept it,) may guard him against the legal effect of an implied acceptance, if compelled, for his own safety, to interfere with the operations of the chartered vessel. But if, with the notice he is required to have, he deliberately elects to accept and adopt the deed, and to partake of the full benefit of it, he cannot complain of being held to its obligation. And if the facts of this case bring it within the analogy, the principles flowing from that analogy must have their application.

Upon a general review of all the considerations that belong to the question, sufficient, I think, is shown to establish this charter-

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party as the deed of both the partners, and to conclude Bunker from objecting to the seal affixed by Seton to the co-partnership name, as the seal of both. The justice of the case, and the good sense of the transaction, requires this construction.

I have endeavoured to show that it is reconcileable with legal principles of the contract, and I have met with no adjudication, which I can consider as binding upon this court, which fetters my own judgment, or compels me, by the force of authority and precedents, to a different decision.

A brief review of the cases cited for the defendant, will show the grounds, which, in my view, distinguish them from this.

In the case of *Clement v. Brush, 3 Johns. Cases, 180.*, where one partner gave a sealed bill in the co-partnership name for a co-partnership debt, there was no proof or pretence of any authority either by deed or by parol for Brush who gave the sealed bill, to seal for Howell, his co-partner; nor did it appear that Howell was present at the time, or even ratified or adopted the deed.

So the case of *Green v. Beals, 2 Caines. 254.*, was a bond and warrant of attorney, confessedly executed by one partner, for himself and his co-partner, without any authority from his co-partner to sign or seal for him, and no subsequent adoption or ratification of the act was shown or pretended.

The case of *Harrison v. Jackson and others*, was an action of covenant on an agreement between the defendants, describing them as merchants and partners of the first part, W. & J. of the second part, and the plaintiff of the third part. The agreement was sealed by one of the defendants for himself and the other two defendants. It appeared to be a partnership transaction, and to have been entered into on full and valuable consideration received by the co-partnership; but it was not executed in the presence of the other partners, nor any authority shown by them to seal it; and it was holden not to be binding upon the absent partners.

This decision, then, did no more than affirm the proposition so often advanced in other cases, that the general powers incident to the relation of partners, on which the case was admitted to rest, does not authorize one partner to bind his co-partners by deed.

There was no pretence of previous authority or subsequent ratification by the absent partners to support the agreement as their deed. The fact that it was for a co-partnership purpose, and, upon a full and valuable consideration, received by the co-partnership, could not take the case out of the general rule. It freed the contract from the imputation of fraud and collusion; but it furnished no evidence of any authority or consent of the absent partners to the agreement, which was sought to be enforced against them as their deed.

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The cases of *Ludlow v. Simond*, *Mackay v. Bloodgood*, and *White v. Skinner*, have already been reviewed, and if my exposition of them is correct, so far from conflicting with the principles I advocate, they lend material aid to the arguments on which I found my opinions.

The *nisi prius* case of *Williams v. Walsby*, 4 Esp. 220., was cited to show that a general authority by parol, from one to execute deeds for another, is not sufficient, but that there should be a special and specific authority to execute the particular deed. That was the case of a release of assignees of a bankrupt, which was pleaded in bar to the plaintiff's action, and by which the defendants alleged that one of the assignees, with the consent of the others, had released. The proof was, that one of the assignees executed the release in the presence, and with the assent of another, and that the third had given to those two a general authority to act for him, as he resided in the country, and could not attend to the concerns of the estate. Lord Ellenborough said, that there should have been a special authority from the third assignee to execute the deed: and that the general authority to act for him, did not warrant what had been done.

The fair exposition of this case is, that the general authority of one of the several assignees in bankruptcy to the others, to act for him, is not sufficient to enable them to execute a release by deed, and so *Whimmarsh* (141) expounds it.

Such an authority does not necessarily import a power to execute deeds, and probably would not in any case be held to embrace such an authority. In its natural and most obvious sense, it would be construed to commit to the co-assignees the active and

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ordinary duties of the trust, and to confer the power of performing all such acts as are incident to it, without consulting him. In this sense of the terms, a general authority to act, would not warrant the execution of the release; but a special authority would be necessary for such a special purpose. But, would a special power to seal that particular deed be necessary? and must that power necessarily be by deed? Lord Ellenborough does not question the sufficiency of such an authority. He does not deny the competency of a special authority by parol to execute deeds. The point of his decision, is, that a general authority from the absent assignee to his co-assignees, to act for him, did not confer a power to execute a release by deed, and he leaves all other questions untouched.

The case of *Steiglitz and another v. Eggington and others*, at *Nisi Prius*, 1 *Holt*, 141., was an action on an award with common counts, for goods sold and delivered, &c.; and it appearing on the trial that the submission was by agreement under seal, and was executed by one of the defendants for self and partner,—C. J. Gibbs, (though no objection was raised by the defendant for defect of execution by them, but the defence was placed on other grounds,) called on the plaintiffs to support the execution of the defendants for “self and partner,” and, upon their proposing to prove that one of the partners gave authority to the other to execute the deed for him, and that the partner who did not execute, had subsequently acknowledged the agreement, and contending that this was a substantial execution, the Chief Justice ruled that the authority to execute, must be by deed: that one man could not authorize another to execute a deed for him, but by deed, and that no subsequent acknowledgment would do; that if one partner, who does not execute, acknowledge that he gave an authority, the court must presume that it was a legal authority; and *that* must be under seal, and must be produced. The report states, that the plaintiffs afterwards proceeded on the common counts, and recovered a verdict; so that the point ruled against the plaintiffs, for the defendants, could not be brought up for review. If the learned Chief Justice is to be understood as holding that one man cannot authorize another to execute a deed for him,

but by deed, nor adopt a deed executed for him by his consent, and make it his own ;—and that this rule is of universal application ;—has no qualifications, and admits of no exception (as his language would seem to import,) he goes further, in my judgment, than the English cases will fairly bear him out ; and, he is, I humbly conceive, at variance with the solemn adjudications of our own courts. If we are to abide by the decisions of our own judicatories, as I understand them, we cannot admit it to be law, that the authority of a partner to execute a deed for his co-partner, must, in all cases, of necessity, be by deed ; or that the subsequent acknowledgment, ratification and adoption of a deed, to which the co-partnership name and seal are affixed by his co-partner for him, will be insufficient to make the seal his own ; unless the authority of the partner to seal for him be by deed, and be produced, which is the doctrine of Chief Justice GIBBS. It is clear, that his opinion did not turn upon any technical objection to the form of action, but upon the validity of the submission. The plaintiff sued upon the award ; and if the submission was binding upon the partner, who did not formally execute it, but gave authority to the other to execute, and after the execution acknowledged it, the award was binding, and no technical difficulty obstructed the action upon it. Nor is the objection put upon that ground. The opinion is, that the submission was unauthorized and void ; and on that ground alone could the plaintiff proceed on the common counts, and recover upon the original causes of action, which were submitted ; and which, if the submission was valid and binding, were merged in the award. And that decision cannot be received as law in this court : because the broad proposition it advances comes too closely in conflict with the principles recognised by the cases cited from the reports of our own country. Without referring to others, I am unable to reconcile it with the cases of *Randall v. Van Vechten and others*, and *Skinner v. Dayton* ; in both of which, the deed of an agent, or partner, executed for his principals or co-partners, without any authority by deed to contract for them under seal, was upon the verbal authority, or subsequent adoption and ratification of the principals, adjudged to be binding upon them ; and the only difficulty in the minds of the

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Judges in either case, (in the way of a legal remedy upon the deed, against the principals,) was the technical objection to the form of action. We must adhere to the principles established by our own courts in preference to the decisions of foreign tribunals; and my own judgment follows, with entire satisfaction, the course which duty prescribes.

The objection to the form of pleading, which forms the defendant's second count, is wholly untenable. It is a clear and well-settled principle, that the pleader may count upon a deed according to its legal effect, and that he is not bound to state the authority by which an attorney executes for his principal. It is sufficient to declare upon a deed executed by an attorney or agent, as the deed of the principal; and as a general rule, it cannot be necessary to state or aver the authority of the agent to execute. Special cases may occur, which will form exceptions; but I see no ground to take this case out of the rule.

When the defendant is to use the deed for his defence against the plaintiff's demand, the rule of pleading is different; for then the authority to execute is of the essence of the defence, and must be averred in pleading, or it cannot be shown in evidence. The test of the correctness of these rules is, that a demurrer to a declaration upon a deed as the deed of the principal, generally, would not be good; and that upon a plea of *non est factum*, the authority of the agent would be matter of evidence, and support the count by showing it to be, as alleged, the deed of the principal; but a plea, setting forth the deed, and the execution of it, by one for the other, without showing the authority to execute, would be bad upon demurrer.

On both grounds, therefore, the motion of the defendant for a new trial, must be refused.

But the plaintiff also excepts to the opinion of the Judge on another point, and asks for a new trial on that ground.

Entertaining no doubt on this part of the case, I shall forbear any examination of the regularity or propriety of the application; contenting myself with the disavowal of all intention to give my sanction to the mode of presenting the question, by expressing my opinion upon the point.



The objection is, that the Judge ruled that the passage money, for the additional passenger, was not recoverable in this action. I think the direction was right. The plaintiff did not charter the cabin of the vessel to the defendants, but gave them the privilege of taking out one passenger only. The cabin subject to that privilege was excepted out of the charter, and reserved to the owners. The defendants had no right to use the cabin for any purpose; but the restriction did not result from any covenant, either express or implied on their part, not to use it, or not to take more than one passenger, but from an exclusion of them by the exception, from all ownership, use or possession of the cabin. The use of it, if wilful and without license, as the plaintiff charges it to have been, was an usurpation, as entirely unauthorised as if they had never chartered the vessel; and they had no greater right to take the passenger, than a tenant would have to locate a lodger in an apartment of his tenements which his landlord had excepted and reserved out of the lease. My view of the testimony, however, is, that the charge of an unauthorized and compulsory obtrusion of the second passenger upon the brig and her owners, is not supported by the evidence; but that the passenger was taken by the consent of the master, and under an agreement with him upon his privilege, expressly secured to him by the contract. But if *that* view of the testimony is incorrect, or if passage money, which belongs to the plaintiff, has been received by the defendants, he must resort to another remedy for the wrong; it cannot be recovered in this action of covenant upon the charter-party. The technical admission resulting from the pleadings, might indeed be conclusive, if the covenant on which the action is founded, warranted the breach. But, on my construction of the deed, no such breach could be assigned, because there was no covenant embracing the case.

*Motion for a new trial denied.*

[Emmet & Grim, *Att's for the plff*, Hoffman & Palmer, *Att's for the defts.*]

NOTE.—Mr. Justice Hoffman gave no opinion in this case, being a connection of the defendant.

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A *better*, who has deposited money in the hands of a stake-holder, upon the event of a trotting match, cannot recover it back, by an action of *indebitatis assumpsit*. The transaction being illegal, no action can be sustained, by the common law, for any cause growing out of it.

But, by the 5th section of the act to prevent horse racing, (1 R. L. p. 222.) any person who has paid money upon the event of a race, may recover the same, "in like manner as is provided in the second and third sections of the act to prevent excessive and deceitful gaming." (1 R. L. 153.) By the second section of this act, any person losing at any game any sum above \$25, and paying the same, may at any time, *within three months*, recover it back of the winner by an action of *debt*, founded on the act. As the remedy afforded to the loser is provided by statute, in pursuing that remedy, the forms and limitations prescribed, must be observed; and a general action of *assumpsit* will not lie.

THIS was an action of *assumpsit*, brought to recover money placed in the hands of the defendant, as a stake-holder, upon the event of a trotting match.

The declaration was in the common form, for money had and received, money paid, &c. Plea, the general issue.

The cause was tried before Mr. Justice OAKLEY; and at the trial the plaintiff produced and read in evidence a contract in writing, between himself and one David Lane, of the tenor following, viz:

New-York, August the 19th, 1827.

"Thirty-one days after date, David Lane, on the first part, and  
"Hugh McKeon, of the second part, agree to trot six miles in  
"harness, each man to drive his own horse, on the Jamaica turn-  
"pike road, for the sum of two hundred dollars a side: two hun-  
"dred dollars, which is deposited in the hands of Mr. James Ca-  
"herty, is to be forfeited in case they do not trot according to the  
"above agreement."

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The plaintiff then proved that he had deposited the stipulated sum in the hands of the defendant, as a stake-holder between the parties; and introduced several witnesses to show, that notice

had been given to the defendant immediately after the match was performed, not to part with the money, in consequence of a dispute between the parties, as to which had won it.

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Upon this evidence the plaintiff rested his cause; and thereupon the counsel for the defendant moved for a non-suit, upon the ground, 1st. That the wager was illegal, and the contract, therefore, void at common law. 2. That if any action could be sustained in this case against the defendant, it must be an action *of debt*, according to the provisions of the acts which give the plaintiff a remedy. 3. That the action was barred by the limitation prescribed in the act, not having been brought within three months from the time the money was deposited or lost by the plaintiff.

The presiding Judge intimated an opinion, that the two first grounds of non-suit were well taken, but reserved the questions for the consideration of the whole court, and directed the defendant to enter upon his defence.

The defendant then called David Lane and his wife, as witnesses, and offered to prove by them that Lane had won the match, and that he (the defendant) had in consequence paid over the money to him, as the winner, immediately after the match was performed. These witnesses were objected to, by the counsel for the plaintiff, as interested in the event of the suit, and therefore incompetent: and it was also contended, that the defendant could not go into the inquiry as to which party was the winner.

The last objection was sustained; but the first, as to the competency of the witnesses, was overruled by the Judge, and an exception to his opinion taken by the plaintiff.

The defendant then introduced several other witnesses, to show that the judges of the match had decided that Lane was entitled to the money, and that he had, in consequence, paid it over to him, on the evening after the match was performed, and before any notice was given to him by the plaintiff to retain the deposit. Upon this last point, the testimony was not perfectly clear.

The Judge charged the jury, that for the purposes of this action, their verdict would depend upon the fact, whether the mo-

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ney deposited in the defendant's hands by the plaintiff, had been paid over to Lane by the defendant, *before notice, and in good faith*. If they should find that he had parted with the deposit against the decision of the Judges, and with a proper knowledge as to what that decision was, he would then have acted in his own wrong, and would be liable to refund the money.

The jury returned a verdict for the defendant.

*Mr. David Graham*, for the plaintiff, now moved for a new trial, upon a case made, and contended :

I. That the plaintiff had a right to maintain this action against the stake-holder, to recover the amount of his bet. Although the contract between the winner and loser may be void, yet money placed in the hands of a stake-holder, upon the event of a race, may be recovered by the depositor. This will appear, by comparing the fifth section of the act to prevent horse racing, (1 R. L. 222.) with the second and third sections of the act "to prevent deceitful and excessive gaming." (1 R. L. 153.)

The stake-holder and winner are equally within the spirit and meaning of these acts, and the loser may maintain an action against the party in possession of the money. (*Allen v. Ely*, 7 Cow. 496.)

II. The *remedy* against the *stake-holder* is not prescribed by statute, but is left as at common law; and *assumpsit* is therefore the proper action to recover back the money. The fifth section of the act to prevent horse-racing, prescribes the form of action against the *winner* only, but is not applicable to the stake-holder. The statute has made a difference between them in this respect; for a *qui tam* action will lie against the winner, but not against the stake-holder; and debt is the action prescribed for all actions *qui tam*. In this case, the statute gives us a remedy, but is silent as to the form of action, and we are therefore left in this respect as at common law. We have adopted the action of *assumpsit* for money had and received, which is, in its nature, like a bill in equity. The statute has given us the equitable right, and we

have adopted the equitable remedy. In this respect, we are sustained also by authority. [*Simmons v. Borland*, 10 *John. R.* 468. 7 *T. R.* 535.]

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*Mr. J. Anthon*, for the defendant, contended,

I. That the wager was illegal. If not unlawful by the principles of the common law, it has been made so by statute, and all contracts growing out of it are void. Where the contract is illegal, the common law will afford the parties no relief. [*Yates v. Foote*, 12 *John. R.* 1.] At all events, where the parties are *in pari delicto*, and the illegal act has been done, the person who has paid his money cannot recover it back. While the contract was executory, and the matter remained *in fieri*, the plaintiff might perhaps have had a remedy: but the illegal act having been completed, he can have no relief. *Quod fieri non debet, factum valet.* [*Vide 1 Esp. N. P.* 21.] Here the unlawful agreement was consummated; the wager was made; the match had been performed, and the money was paid over. It cannot be recovered back.

II. As the plaintiff can have no relief by the common law, his remedy, if he has any, must be founded upon the fifth section of the "act to prevent horse-racing." This statute was intended for the benefit of the loser; and if he would avail himself of its provisions, he must observe the *forms* which are prescribed. The very act which gives the remedy, confines the plaintiff to an action *of debt for money had and received*. *Assumpsit* will not lie; and in all the cases under the statute, which have been sustained by the courts, the form of action adopted has been debt for money had and received. [*Haywood v. Sheldon*, 13 *John. R.* 88. 15 *John. R.* 5. 7 *Cow.* 252. 496.]

The statute in this respect has made no difference between the winner and stake-holder. If the latter is subject to all the penalties of the former, he is at least entitled to the same indulgence and protection. The plaintiff, to entitle himself to the benefits of the act, must, at all events, obey its requisitions. This he has not done, and he ought to have been non-suited at the trial.

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[There were several other questions discussed by the counsel for both parties, especially in relation to the limitation of time in bringing the action prescribed by the act to prevent gaming, and in relation to the competency of Lane and his wife as witnesses. The counsel for the plaintiff also contended, that the verdict was against the weight of evidence upon the point of notice. But as these questions are not considered by the court in giving their opinion, the discussion of them is omitted here.]

**OAKLEY, J.** THIS was an action of assumpsit, to recover money deposited in the hands of the defendant as a stakeholder on a trotting match, made by the plaintiff with one Lane. Lane claimed to be the winner, on the decision of the match. The declaration was in the common form, plea non-assumpsit. The principal question in the case is, whether the action can be sustained at all, in its present form.

By the first section of the act to prevent horse-racing, [1 *R. L.* 322.] all racing or trotting of horses, for any bet, is declared to be a common and public nuisance, and an offence against the state; and all parties concerned therein are rendered liable to punishment, by fine and imprisonment. And by the 5th section of the act, all contracts made for, or on account of, any sum of money staked, or depending on any race or concerning the same, are declared to be void in law.

By the operation of this statuté, the wager, in the present case, was not only illegal, but the act of trotting the match, on the result of which it depended, was a crime: and the first inquiry is, whether any action can be sustained, by the common law, for any cause growing out of such a transaction.

In the case of *Yates v. Foote*, 12 *John. R.* 1. in the Court of Errors, it was decided, that where money is deposited with a stakeholder on an illegal wager, no action lies, after the event has happened, by the loser, to recover back the deposit. The general principle of that case is, that when men will engage in a known violation of the law, the law will leave them in the situation in which they have placed themselves, and cannot be invoked to the aid of either party. This principle is fully applicable to the present case. The

trotting match being both illegal and criminal, no right of action by one party against another, can arise out of any thing connected with it. A man ought never to be permitted to come into court, averring his own criminality, and then call on the law to restore him that, which he has voluntarily parted with in the very act of violating the law, and committing the crime. In the case of *Egerton v. Furzeman*, [1 Car. & Pay. 613.,] an action was brought to recover money staked upon a dog fight. C. J. Abbot ordered the cause to be struck out of the paper, and refused to try it; saying that he thought the time of the court was not to be wasted, in trying which dog or which man won a battle. It cannot in the eye of the law be considered a more dignified employment, to be trying which horse won a race.

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I am satisfied that this action cannot be sustained by the principles of the common law, as established by authority in this state. It remains to be seen, whether there is any thing in the statute above alluded to, which can uphold it.

By the 5th section of the act, it is provided, that any person, who may have paid any money, upon the issue or event of any race, may recover the same "in like manner as is provided in the "second and third section of the act entitled an act to prevent "excessive and deceitful gaming." By the second section of the last mentioned act, [1 R. L. 153.,] any person losing at any game, any sum above \$25, and paying the same, may at any time, within three months, recover it back of the *winner*, by an action of debt, founded on the act. And in in such action, the plaintiff may allege in his declaration, that the defendant is indebted to him, in the sum so lost and paid, "for so much money "had and received by said defendant, to the plaintiff's use; with- "out setting forth the special matter."

It has been adjudged, by the Supreme Court. [7 Coven. 496.] That under the 5th section of the "Act to prevent horse racing," an action lies by the loser against the *stake-holder*. The court say "the "5th section, declares the wager void, and gives a remedy against "the party to recover it back. The action lying against the "party, *a fortiori*, does it lie against the *agent*." The stakeholder and the winner, are, by the effect of this decision, placed on the

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same footing. The *remedy given by the act* is equally available against both.

It is contended by the defendant in the present case, that, if liable to the action at all, it can only be sustained against him in the form, and under the restrictions and limitations prescribed by the statute. I think the position a true one.

In *Hayward v. Sheldon*, [13 *John. R.* 88.] an action was brought to recover back a wager on the event of a horse race. The plaintiff declared in the general form provided by the 2d section of the "Act to prevent excessive and deceitful gaming;" and the court said, that it was "the correct and only manner of proceeding to "authorize a recovery." Indeed it does not seem to require any reasoning or authority to show, that if no action in such a case can be sustained without the aid of the statute, the form prescribed by the statute must be observed. And such appears to have been the practice, as far as can be gathered from the cases on the subject, which have been reported. In *Hayward v. Sheldon*, [13 *John. R.* 88.] and in *Allen v. Ehle*, [7 *Cowen.* 496.] the action was *debt*. The declaration was in the general form, for money had and received; but such form is expressly given by the statute. [*Collins v. Ragrew*, 15 *John R.* 5.] In *Simmonds v. Borland*, [10 *John, R.* 468.] it does not appear what was the form of the action. It was commenced in a Justice's Court, and for aught that is contained in the report of the case, may have been an action of debt. There is no case, it is believed, in which an action under the statute has been tried on an issue of non assumpsit.

If, however, it should be doubted, whether the *form* of the action prescribed by the act against gaming, applies to the case of the *stake-holder*, it by no means follows that assumpsit can be maintained, though a general right of recovery may be given against the stake-holder by the fifth section of the act against horse racing. The general rule appears to be, that when an action is founded upon a statute, the declaration must state specially the cause of action arising under the statute, unless a particular form of declaring is given by it. [*Cole v. Smith*, 4 *John. R.* 194.] If, then, in the present case, the plaintiff was not bound to pursue



the form pointed out against the winner, he should have stated his case specially. His general action of assumpsit cannot be sustained.

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The plaintiff, then, ought to have been non-suited on the trial. But the Judge reserved any decision of the motion to non-suit, and permitted the defendant to show that he had paid the money over to the winner; and he obtained a verdict on that ground. I am satisfied, on reflection, that such a defence ought not to have been permitted. The stake-holder, by the statute, is placed *in pari delicto* with the betters: they are all equally criminal. The stake-holder, if he pays the money over, does it in furtherance of an illegal and criminal purpose. It is not like the case of a merely illegal wager, where the law attaches no illegality to the act of holding the stake. And in this light the Supreme Court seem to have viewed it, in *Simmons v. Borland*. Judgment cannot, therefore, be given for the defendant on this verdict; but a judgment of non-suit may be ordered to be entered, the Judge at the trial having reserved the decision of the motion for that purpose. It would be useless to grant a new trial, as the plaintiff cannot be permitted to recover in the present form of action.

*Judgment of non-suit.*

[D. Graham, Jr., *Att'y for the plff.* J. R. Whiting, *Att'y for the def.*]

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JAMES T. TALMAN *versus* JOHN GIBSON.

Where the holder of a promissory note has obtained possession of it by fraud, he cannot maintain an action upon the note against any of the parties to it.

Possession is *prima facie* evidence of a transfer to the holder: yet, if the defendant can show that the plaintiff obtained the note by his own fraudulent act, he has a right to defeat the action on that ground, although he may be liable to pay the note to the true owner.

The consideration *merely*, on which the note was received by the holder, is not to be questioned; but the defendant may show that no consideration was paid by the holder, as *one step* towards the proof of fraud, on his part, in obtaining the note.

THIS was an action upon a promissory note, made by one George Gibson, in favour of the defendant, endorsed by him to one Rogers, by Rogers to Samuel C. Hyslop, by Hyslop to one Peter W. Spicer, and by him to Charles B. Spicer.

Plea, the general issue.

The cause was tried on the 12th day of September, 1838, before Mr. Justice Hoffman.

At the trial, the counsel for the defendant stated, that it was not denied, that George Gibson owed the note in question, nor was the defendant's liability, as endorser, denied. That this defence was set up by Samuel C. Hyslop, (one of the endorsers,) who claimed to be the true owner of the note. That Hyslop had put the note into the hands of Peter W. Spicer, as his agent, for the purpose of having it discounted. That Spicer, in order to procure the money, employed one Samuel Healy, as a broker, who received the note, but neglected to account for it, and refused to give any information as to what had become of it. That Hyslop, upon investigation, finally discovered that the note had been lodged by the plaintiff in the Mechanics' Bank for collection. That he called upon the plaintiff, and demanded the note as his property; but the plaintiff refused to surrender it up, unless the full amount thereof was paid: saying, that he had received the note of Healy as security for a debt of \$70, due from Healy to him.

The counsel for the plaintiff objected to the admission of this evidence, upon the ground, that the facts, if proved, could not be interposed by *Hyslop* as a defence to this action. That the defendant, having negotiated the note upon a good consideration, could not inquire into the consideration passing between subsequent holders.

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It was ruled, by the presiding Judge, that the facts stated by the defendant's counsel, if proved, would form no defence against the plaintiff's claim.

The defendant then called Peter W. Spicer as a witness, who testified, that the note in question actually belonged to *Hyslop*: that the witness had called upon the plaintiff for it, but he refused to deliver it up, saying that he had received it in payment of, or as security for, a debt due to him from *Healy*.

The defendant also called *Healy*, and offered to prove by him, that the plaintiff had given no consideration for the note; that there was no debt due to him from the plaintiff at the time the note passed into his hands, but on the contrary, that the plaintiff was actually indebted to the witness.

The Judge decided that this evidence was not admissible to form a defence between these parties. That *Hyslop's* remedy (if he were the true owner of the note) would be by action of trover against the plaintiff: that there would be no safety in negotiable paper, if a defence of this kind could be interposed between the holder and a party who had received a full consideration for it.

To this opinion and decision, the counsel for the defendant excepted; and the jury, under the direction of the Judge, found a verdict in favour of the plaintiff, for the full amount of the note.

The defendant now moved for a new trial; and *Mr. Mulock* contended,

I. That the defence offered, was improperly rejected. The testimony showed that the note was the property of a third person, who had lost it: the plaintiff was therefore bound to prove the consideration upon which his title rested. Were he an innocent purchaser, without notice—or if he had negotiated the note,

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for a valuable consideration, the defendant would have been concluded, because the note would then have been in the hands of a *bona fide* holder. In this case, the defendant is not the plaintiff's debtor; and he cannot be made such by the plaintiff's wrongful possession of a note to which he has no title.

II. This defence may be set up by the true owner of the note. It invades no principle of policy—it disturbs no rule applicable to negotiable paper: on the contrary, a wrongful holder ought never to be permitted to recover, where the true owner is known, and asserts his rights. The title of the plaintiff is not strengthened, because the defendant has received a full consideration for the note. If he recovers, he must recover by the strength of his own title, and not from the fact that the defendant owes the money. The plaintiff who holds a note, obtained from the true owner by fraud, without having paid value for it, holds it in privity with the wrong doer; and the latter certainly cannot recover, where the true owner interposes the defence. It is of no consequence to the defendant, whether he pays the money to the holder or the true owner; but it is a matter of much importance to the latter, to prevent the money from passing into the hands of an irresponsible and fraudulent holder, from whom he might not be able to recover it.

The right to inquire into the consideration, which the plaintiff paid for this note, rests upon the same ground on which the law places the right to inquire, whether the holder of a stolen note has received it innocently, and for a proper consideration, in the course of its circulation. If the consideration upon which the remote holder of a note received it, can never be inquired into, in an action against the maker or endorser, then the mail robber may enforce his claims against the rightful owner with impunity and success. It is believed that the law will not permit such injustices to be done. [*He cited 3 Kent's Com. 51. Chit. on Bills, 190. 2 Camp. Rep. 574. 1 Connec. Rep. 494. Shepard v. Hall.*]

Mr. Geo. T. Talman for the plaintiff.

Gibson, the defendant, having negotiated the note upon a

valuable consideration, cannot inquire into that, which passed between the subsequent parties to it. If it were competent for him to do so, he does not set up this defence, but it is interposed by Hyslop for him. To what purpose? If a recovery by the plaintiff be defeated, Hyslop will not receive his money, but must resort to an action of trover to recover the note out of the plaintiff's hands. Until the note can be placed in the hands of a person entitled to sue upon it, the defendant can never be compelled to pay the amount, which he justly owes. He received the full value of the note when he passed it away, and if this defence can prevail, the defendant, who does not deny the justice of the demand upon him, will securely hold the money to which he has no title.

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II. The case shows, that the plaintiff is an innocent purchaser for a valuable consideration. He received the note as security for his debt, without notice that Hyslop had been defrauded of it by Healy. The note came into the plaintiff's hands by regular endorsement, and he deposited it in the Bank for collection, according to the course of his business. But the defendant offered to contradict this state of facts by Healy himself. The testimony of this witness, besides the general suspicion cast upon it from the transaction itself, was properly rejected. It would have drawn into controversy the state of his accounts with the plaintiff, and the latter in an action against Gibson, could not have expected to investigate matters entirely collateral. He would therefore have been taken by surprise, and the learned Judge was perfectly right in rejecting his testimony. The plaintiff, at all events, should have had notice as to the nature of the defence. [*He cited Chit. on Bills, p. 91. Braman v. Hess, 13 John. Rep. 52. Russel v. Ball, 2 John. R. 50. 4 Taunt. 114.*]

OAKLEY J. THIS was an action on a promissory note, made by one George Gibson, payable to the defendant, and endorsed by him and Samuel C. Hyslop. The defendant admitted his liability on the note in question,—but offered to show by way of defence to this action,—that the plaintiff held the note fraudulently and without consideration. The defendant called one Spicer as

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a witness, who testified that the note in controversy was actually the property of Hyslop, and that he had, as agent for Hyslop, called on the plaintiff to deliver up the note, which he refused to do, saying, that he had received it in payment, or as security, from one Healey. The defendant then called Healy, and stated, that he expected to prove by him, that there was no consideration for the negotiation of the note by him to the plaintiff, and that there was no debt due from him to the plaintiff at the time the plaintiff got the note ; but that on the contrary, the plaintiff was indebted to him, (Healy.)

The Judge excluded the evidence, saying, that the defence offered, could not be interposed between a holder of negotiable paper, and a party who had negotiated it on a good consideration. The jury found a verdict for the plaintiff.

The defendant now moves for a new trial.

It is believed to be well settled, that if the holder of a note obtains it by fraud, he cannot maintain an action on it against any of the parties to it. He must aver and prove, that the note was transferred to him ; and, though his possession of the note is *prima facie* evidence of the transfer, yet, if the defendant can show that the plaintiff obtained the note by his own fraudulent act, he has a right to defeat the action on that ground, although he may be liable to pay the note to the true owner. He has not a right to question the consideration merely on which the holder received the note ; but he may be permitted to show, that there was no consideration paid by the holder, as one step towards the proof of fraud on his part in obtaining it. This proceeds on the general doctrine, that no man can acquire a right by his own fraud, to sustain an action in any court ; and it is a principle of universal application. This doctrine is fully recognized as applicable to Promissory Notes, Bills of Exchange, and Bank Notes. [*Solomons v. The Bank of England*, 13 East. 135. *Rees v. Marquis of Headfort*, 2 Camp. 574.]

The offer in the present case, on the part of the defendant, to show that the plaintiff obtained the note *fraudulently*, seems to come within the general rule here laid down.

The fact, that no consideration was paid by the plaintiff, and that Healy was not indebted to him, as he alleged, if proved, in connection with other evidence which, the defendant would perhaps have produced, if he had been permitted to proceed in his defence, might, for aught the court can say, have established the fact of fraud against the plaintiff. Considering then, that the offer on the part of the defendant was, to show *fraud*, on the part of the plaintiff in obtaining the note, and not merely to show a *want of consideration* for the negotiation of it to him, I think that the Judge *erred* in excluding the testimony of Healy.

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In *Paterson v. Hardacre*. 4 *Taunton*, 114. the court held, that where a bill had been obtained fraudulently from the defendant, the holder must prove that he came to the possession of it upon good consideration: but that the defendant could not require such proof, unless he had given seasonable notice to the plaintiff that he meant to insist at the trial, that he should prove the consideration on which he received the bill.

I should be much inclined to adopt this rule in like cases, but in the present instance, it does not appear that any objection was made by the plaintiff of the want of notice of the defence which the defendant intended to set up. There must be a new trial.

*New trial granted.*

[*Hoffman & Talman, Att's for plff. W. Mulock Att'y for the def't.*]

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v.  
Hamilton.

DAVID HENDERSON, JUN., & WILLIAM CAIRNS, JUN.

*versus*

ALEXANDER HAMILTON.

The defendant on the 3d of January, 1815, executed a bond for \$8,500 in favour of the plaintiffs, to secure the payment of \$4,404,52. The condition of the bond recited, that to pay and satisfy the last mentioned sum, one John C. Hamilton had by indenture granted unto the plaintiffs an undivided interest in certain lands (which had been conveyed by Timothy Pickering to John B. Church and others in trust,) which were unproductive and could not be divided for several years thereafter. The condition further stipulated, that the defendant should pay to the plaintiffs, year by year, the sum of \$308,21, the lawful interest on said sum of \$4,404,52, until the said estate should be divided and a clear and perfect title thereto, made to the plaintiffs.

In an action upon the bond to recover the amount of the annual payments, from the year 1818, to 1828, the defendant contended, I., that the plaintiffs were bound to show diligence in procuring a partition of the lands conveyed. II. That they were barred by the statute of limitations, from recovering any thing in arrears beyond six years, or that there was a presumption of payment from lapse of time. *Held*, however, that the statute of limitations did not apply to this case; that there was no presumption of payment, and that the plaintiffs were not bound to procure a partition of the estate. *Held*, also, that the annual payments were to be viewed in the light of interest on the principal sum, and that the plaintiffs were not entitled to interest upon the annual payments.

THIS was an action of debt on a bond, for eight thousand five hundred dollars, executed by the defendant in favour of the plaintiffs, and bearing date on the third day of January, 1815. The condition of the bond was as follows:—

“Whereas the above bounden obligor *was on the day of the date hereof, indebted unto the above named obligees*, in the sum of four thousand four hundred and four dollars and fifty-two cents, lawful money, of the United States of America, *to pay and satisfy which*, John C. Hamilton of the city of New-York, attorney at law, *hath*, by indenture bearing even date, herewith *granted*, bargained and sold, aliened, remised, released, conveyed and confirmed unto the above named obligees, an undivided interest, which he was entitled to, together with the other heirs and



“widow of Alexander Hamilton deceased, to certain lands and premises, which were conveyed by Timothy Pickering to John B. Church, Nicholas Fish, and Nathaniel Pendleton in trust, and upon certain conditions, as specified and contained in an Indenture, bearing date the seventh day of May, eighteen hundred and eight, as by reference to the deed of the said John C. Hamilton, to the above named obligees, will more fully and at large appear. And whereas, the estate and property remains undivided, and is unproductive, and cannot be divided for several years to come, during which period, and until the same shall be divided according to the trust created, it was further agreed, that the said Alexander Hamilton should pay the lawful interest on the said debt of four thousand four hundred and four dollars and fifty-two cents yearly, and every year, until the said estate is divided, and the share or portion of the said John C. Hamilton shall be conveyed by the trustees to the said David Henderson Junior, and William Cairns Junior, their heirs or assigns. Now the condition of the above obligation is such, that if the above bounden obligor, his heirs, executors, or administrators shall, and do well, and truly pay or cause to be paid unto the above named obligees, their heirs, executors, administrators or assigns, yearly, and every year, on the third day of January, the sum of three hundred and eight dollars and thirty-one cents, the lawful interest on the said sum of four thousand four hundred and four dollars and fifty-two cents, until the said estate is divided, and a clear and perfect title thereof, be made to the above named obligees, their heirs or assignees, then the above obligation to be null and void, or else to be and remain in full force and virtue.”

The declaration was in the common form, and the defendant, after craving oyer of the bond and condition pleaded, 1st, *non est factum*, 2d, *solvit ad diem*. The last plea, however, [was afterwards stricken out under a stipulation, that the defendant should have all the advantage of the statute of limitations, which could be gained by any special plea.

The plaintiffs then assigned breaches for non-payment, setting forth the conditions of the bond and averring, that the estate and property therein mentioned, remained undivided on the third day

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of January, 1818, and that no title thereto had been made to the plaintiffs, or their assigns on that day, and that the sum of three hundred and eight dollars and thirty-one cents, became due and owing to them on that day according to the form and effect of the said condition, which sum was still in arrear. There were similar breaches assigned as to each of the ten following years, up to, and including the year 1828.

The cause was tried before Mr. Justice OAKLEY. At the trial, the defendant admitted the execution of the bond, and that the breaches of the condition were truly assigned by the plaintiffs : (the admission to have no effect upon his defence however,) and it appeared that the sum of three hundred and eight dollars, and thirty-one cents, which became due on the third day of January, 1816, and the like sums, which became due on the same day in the year 1817, had been paid by the defendant to the plaintiffs.

On this state of facts the counsel for the defendant moved for a non-suit, on the ground, that there was no evidence that any diligence had been used by the plaintiffs to effect a partition of the land, mentioned in the condition of the bond. This motion was overruled by the presiding Judge. The plaintiffs then claimed the yearly sum of three hundred and eight dollars and thirty-one cents, from the year 1818, to the year 1828, together with interest on each yearly sum, as the same accrued. The defendant insisted that the plaintiffs were only entitled to recover such sums, as had accrued on said bond for the last six years, claiming that all the residue was barred by the statute. He also contended that no interest was allowable on any of the annual sums. These points, however, were both ruled against the defendant, and the jury by the direction of the Judge gave a verdict for \$4,815,69, in favour of the plaintiffs, subject to a case to be made, which either party had leave to turn into a bill of exceptions.

The cause was now argued by Mr. J. Anthon for the defendant, and by Mr. David S. Jones for the plaintiffs.

*Mr. J. Anthon* for the defendant contended,

1. That the plaintiffs were bound, from the nature of their engagement with the defendant, to use due diligence to effect a

partition of the lands conveyed in payment of the original debt, so that the interest might cease.

II. They were bound to show that they had used such diligence, and notified the defendant of the difficulty, if there was any, that he might guard himself against the constant recurrence of the claim of interest.

III. This creation of an annual charge after the extinguishment of the original debt, as far as the defendant was concerned, is within the spirit and equity of the statute of limitations, and the annual sums due more than six years back, are barred by the statute.

IV. If the statute does not apply, and the defendant is driven, as in ordinary cases on bonds, to a presumption of payment from lapse of time, *the circumstances of this case*, make the lapse of six years, a fair legal presumption of payment. [1 *Term R.* 270. 19 *Ves.* 196. 10 *John. R.* 381. 16 *John. R.* 214.]

V. If the plaintiffs are entitled to recover, for the nine years as claimed, they have no right to demand interest on the several annual sums, the non-payment arising from their own laches in not demanding; and such interest is in truth compound interest on the original debt, which the law will not tolerate. [1 *John. Chan. Cas.* 13. 6 *John. Chan. Cas.* 313.]

VI. The plaintiffs must therefore, either take a verdict for the last three years, or for the nine years, as the court shall decide, on the subject of the statute, or the legal presumption of payment; and in both cases without interest.

*Mr. D. S. Jones* for the plaintiffs, *contra* contended,

I. That the plaintiffs had not the power under their deed to effect a partition. The legal title to the estate, remained in the trustees named in the condition of the bond, and John C. Hamilton conveyed nothing to the plaintiffs but an equitable interest. The defendant on the other hand has an interest in the land, and all the means of effecting a partition, if any there be, are still open to him. Upon him lay the duty of putting a stop to the interest, which was annually accumulating, either by paying it

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when due, or by causing the partition to be effected, by which the plaintiffs might be put in possession of their estate.

II. The statute of limitations is in no way applicable to this case.

III. As to the interest. Suppose a bond conditioned to pay a certain sum yearly, and without any reference to the origin of the debt: in case of non-payment of the sum due, at the end of the year, the holder would be as much entitled to interest on *that sum*, as if the *whole amount* of the bond had fallen due at the same time.

This case is of the same nature. It is an annuity; the annuity is a principal sum, and not interest, and in all cases of annuity bonds, interest is allowable. [3 *Atk.* 579. 2 *Dickins R.* 643. 2 *P. Wms.* 163. 1 *P. Wms.* 542.]

*Per Curiam.* The annual sums to be paid by the defendant, were themselves in the nature of interest upon the principal sum secured by the bond. The bond was a continuation of the original debt, and the annual sums are not to be viewed in the light of annuities. Interest upon them, therefore, cannot be allowed, for that would be in effect to allow interest upon *arrears* of interest.

The statute of limitations does not apply to this case, neither is there any foundation for a presumption of payment. The plaintiffs were not bound to procure a partition of the estate; but by the very terms of the condition of the bond, the defendant himself was to furnish them with "a clear and perfect title."

The verdict of the jury, modified as to interest in the manner specified, must therefore be confirmed.

*Judgment for the plaintiffs.*

[D. S. Jones, *Att'y for the plffs.* E. Anthon, *Att'y for the def.*]

HUGH McKEON *versus* DAVID LANE.Dec. Term,  
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In an action against a witness for the penalty imposed upon him by the statute, [1 R. L. 524.] for not attending at a trial, when duly subpoenaed, the declaration must state specially, among other things, that the fees of the witness were paid or tendered to him, and it is not sufficient to allege that the witness was "legally subpoenaed according to the practice of the court."

THIS was an action of debt upon the statute, [1 R. L. 524. Sec. 20.] against the defendant, to recover of him the penalty of fifty dollars, for not appearing as a witness in a certain cause in which the said Hugh McKeon was plaintiff, and one James Caherty was defendant.

The declaration averred, that on the first Monday of September, of the September term of this court, in the year 1829, the plaintiff impleaded one James Caherty in said court, in an action on the case on promises, and such proceedings were thereupon had, that upon issue joined, the said cause came on to be tried in its regular order upon the calendar of said court on the 11th day of October, in the year aforesaid, before a jury. That the plaintiff, in order to maintain the issue on his part, "believing the said defendant to be a material witness for him" "upon the trial of said cause," and being so advised, did cause the said defendant to be *legally subpoenaed* as a witness on his behalf, "according to the course and practice of the said court." But the defendant, "not regarding the statute in such case made and provided," although solemnly called, "did not appear to give his testimony," "although he had no reasonable let or impediment to the contrary, but refused and neglected so to do, in contempt of the statute." By reason whereof, and because the evidence, which the defendant would have given was material to the plaintiff, "for want of the testimony of the said defendant," "the plaintiff could not safely proceed with the trial of the said cause, but was thereby compelled to pray the court to allow him to withdraw the trial of the said cause before the said court and jury." By reason whereof, &c.

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The defendant pleaded first *nil debet*. Second, that the plaintiff ought not to maintain his action, because, although the defendant being solemnly called on said *eleventh day of October*, did not appear, yet the plaintiff "was thereupon allowed by "the said court to withdraw his record, and continue the "said trial to another day in the said term, to wit, on the 16th "day of October," &c. "in the year aforesaid," "on which day "the said cause came on to be tried in its regular order upon the "calendar," "and the said defendant did appear pursuant to the "subpœna aforesaid," and "was then and there in the presence "of the said court and jury: which said jury, upon that occasion, "notwithstanding the testimony given by the said defendant, then "and there" "rendered a verdict in favour of the said James "Caherty, the defendant in the said suit," &c.

The defendant also pleaded a third plea, in which he alleged, "that the said cause, on the 16th day of October," aforesaid, "came on to be tried in its regular order," &c.; that the defendant, "then and there, in obedience to the process aforesaid, attended said court, and was then and there presented and offered "as a witness on the part and behalf of the *defendant* in said "cause; and upon being so produced and offered as a witness, "was then and there *objected to by said plaintiff as an incompetent "witness.*" That the defendant, nevertheless, gave his testimony at the trial, and, notwithstanding such testimony, the jury rendered a verdict in favour of Caherty, the defendant in that suit, &c.

To these two special pleas, the plaintiff demurred, and the defendant joined in the demurrer.

*Mr. D. Graham*, in support of the demurrer, now contended:

I. That the defendant had, in his pleas, misconceived the plaintiff's cause of action. The statute upon which this action is brought, gives the party who is aggrieved by the non-attendance of a witness, fifty dollars as a *penalty, besides his damage* actually sustained. In this case, the plaintiff claims the penalty only, and he neither seeks special damage, nor has he laid any such in his declaration. The defendant, by his pleas, admits that he did not appear at the trial when the cause was called, on the

11th of October; that he had no excuse for not appearing, and that the plaintiff was compelled, by his non-appearance, to postpone the trial of his cause to a subsequent day. Here, then, is an injury admitted upon the face of the pleadings, and the statute has prescribed the penalty. The pleas, therefore, are no answer to the action, and cannot be sustained. [*Doug. 556. Pearson v. Lea.*] The plaintiff claims the *forfeiture*, and it is sufficient, if he set forth substantially the *cause* of the forfeiture and his *right*. This he *has* done; for the declarations set forth, 1. A suit pending. 2. The due and legal service of the subpoena. 3. The non-attendance of the witness; and fourthly, the injury to the plaintiff.

The first special plea is bad, because it confesses the fact of non-attendance, and the injury to the plaintiff, but does not avoid the effect of that confession by any sufficient matter. The excuse arises from matters *ex post facto*, and cannot be any answer to an allegation of injury previously perpetrated.

The third plea is bad, on the ground of departure, and this objection is fatal on general demurrer. [*Sterns v. Patterson, 14 John. R. 132.*] What if the defendant did appear at the trial of the cause, and what if he were offered as a witness by the *defendant* in that cause, and was objected to by the plaintiff? Is that any excuse for not appearing on the 11th of October, at the plaintiff's requisition? The plaintiff complains that the defendant did not appear when his cause was called, whereby he was compelled to postpone the trial. The defendant replies—true it is, I did not appear when you were ready for trial, but I appeared afterwards when your *adversary* was ready, and I testified in *his* behalf, and you lost your cause: *ergo*, you were not injured by my non-appearance on the 11th of October, although the whole expense of that day's attendance and preparation was thrown upon you by my neglect! The plea goes further: it admits, that under the statute, it was the defendant's *duty* to attend when called, and it admits a violation of that duty, without the semblance of an apology for it. The pleas are bad on every ground, and cannot be supported.

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*Mr. Anthon, contra*, contended,

I. That as this was a penal action, the plaintiff ought to have set forth in his *declaration* all the circumstances, which are made necessary by the statute to bring the party within the penalty, it being a settled rule in declaring for offences against penal statutes, (where no form is expressly given,) that the plaintiff shall set forth the facts specially which constitute the offence. [*Bigelow v. Johnson*, 13 J. R. 428.]

The declaration must show *what has been done*, that the court may judge whether an offence has been committed, and the conclusion, *contra formam statuti*, will not aid the omission of the facts. [1 Chit. Plead. 357. *Barnes v. Talbot*. 1 Salk. 212.]

II. The statute imposes the penalty only in those cases where the party has been subpœnaed, and has been tendered his allowance for travelling to, attending at, and returning from, the court, including one day's attendance only. These matters are not averred in the declaration, and it is bad for this reason.

The plaintiff has not set forth enough to put the witness in default, for he was not bound to attend the court until his fees were tendered. There is nothing to show that the plaintiff pursued the steps required by law, and the defect is not cured by the allegation, that the witness was "*legally subpœnaed*." That is a conclusion of law, not the statement of a fact, and the pleader was bound to allege *the facts*, that from them the court might judge whether the witness was "*legally subpœnaed*" or on. [5 Mod. R. 353. 3 Chit. P. 457.]

III. There is no direct averment as to the materiality of the witness; neither is there any averment of the plaintiff's being aggrieved. The withdrawing of the record was no grievance, and the penalty is given only to the party aggrieved. [*Cro. Ca.* 522. 541.]

IV. The whole term being one day, an effectual appearance by the witness, pursuant to the subpœna, and the giving of his testi-



mony at the trial, form an answer to the claim for the penalty.

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1. Because the witness obeyed the subpoena.

2. Because the plaintiff has not been aggrieved. This is the substance of the first special plea, which is therefore good.

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V. The second special plea shows the appearance of the witness according to the exigency of the subpoena: that he was objected to by the plaintiff, but admitted as a witness, and that the verdict was for the defendant. This plea is good, because it shows, 1. Obedience to the process. 2. The immateriality of the witness, so far as the plaintiff was concerned; and thirdly, the absence of all grievance on his part.

VI. The plaintiff, to maintain this action, after conforming to all the requisites of the statute, ought to have submitted to a nonsuit, or at all events, he ought not to have brought his cause to trial at the same term. This last act relieved him from all grievance, and was a *waiver* of all claim to the penalty. But at all events, the witness' default, under the circumstances, exposed him to an attachment only, and he is not liable in this action.

*Mr. Graham in reply* contended, that the declaration set forth all that good pleading required. It avers that the defendant was "legally subpoenaed, according to the course and practice of the court," and the legal service of the subpoena includes the showing of the original, the delivery of a copy, and a tender of the fees. The facts are stated with such certainty, that they may be understood by the opposite party, the court, and the jury. This is all that good pleading requires. [*Com. D. Pleader, C. 17. 1 Ld. Ray. 680. 9 East. 473.*] If the omission to state the particulars were a defect, still the defect is of such a nature, that it could be reached only by a special demurrer to the declaration. By *pleading*, the defendant has waived all objection to the defect, and he cannot now take advantage of it under the plaintiff's general demurrer. [*6 Com. Dig. 208. Steph. on Plead. 162.*]

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II. But here it is said there has been no damage. But the cause was called, and the jury empanelled. The plaintiff, not being able to go on with the trial because of the defendant's absence, was compelled to withdraw his record, postpone the trial, and pay the costs. Here is special damage following, as a natural consequence, the defendant's neglect of duty, and that is sufficient to sustain the action. But the plaintiff is not bound to allege or prove special damage, for his action is given by the statute, which allows the party aggrieved to have the penalty. How aggrieved? By the *absence* of the witness, not by the *loss* of his cause. In order to sustain this action, it is not necessary for the plaintiff to prove that he would have *prevailed* at the trial, if the witness had been present, for this would compel us in an action upon a statute, to go into the merits of a matter entirely collateral.

*Per Curiam.* Without going into any examination of the defendant's pleas, we are compelled to decide this demurrer against the plaintiff. By the course of pleading adopted by himself, he has enabled the defendant to avoid a justification of the matter set up by him as a defence to the action, and go back to defects in the declaration. Upon a general demurrer, the rule is familiar, that the judgment must be against the party who commits the first fault, and here the plaintiff is in that predicament. He has not set forth enough to enable the court to judge whether the defendant was bound to appear at the trial. True it is, there is an allegation that the defendant was legally subpoenaed, but that is not sufficient. The plaintiff's attorney is not to be the judge of that, but he is to set forth all the facts of the case, that the court may judge of their effect. The declaration must have sufficient certainty upon its face to enable us to know what has been done. Facts are to be stated, not inferences or matters of law; and the party succeeds upon facts alleged and proved.

Now in order to convict this defendant, the plaintiff must prove at the trial, that a subpoena was exhibited to the witness under the seal of the court; that a copy thereof was served upon him, and that he was tendered such fees as the law allows to him. These facts are not all to be embraced in one conclusion by the pleader;

for if they were stated, the defendant has a right to deny and form an issue upon them. But we give judgment against the plaintiff upon this point alone, namely, that the declaration contains no averment that the fees of the witness were paid or tendered to him. This must be expressly averred in the count, and proved at the trial, in order to convict the defendant. The case cited from Douglas, sustains this position, and does not aid the plaintiff. But we were referred to a precedent in Brown's Entries. Upon looking at that precedent, we find that the averment is there expressly made, and there must be judgment for the defendant on the demurrer. But the plaintiff may amend his declaration on payment of costs.

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*Judgment for the defendant on the demurrer.*

[D. Graham, Jr. *Att'y for the plff.* J. R. Whiting, *Att'y for the def.*]

JOHN M. ROBBINS

*versus*

THE NEW-YORK INSURANCE COMPANY.

The charterer of a ship has no interest in the freight *as such*, and he cannot, therefore, insure it *as nomine*. It seems, however, that an *advance* of freight-money may be insured under the general name of freight; but to enable the charterer to recover the amount of the underwriter, he must prove the fact of the advance.

THIS was an action upon a policy of insurance for \$1000, made by the defendants in favour of the plaintiff, *upon the freight* of all kinds of lawful-goods and merchandise laden or to be laden on board the schooner Penobscot-Packet, at and from New-York to Wilmington, in the state of North Carolina, from thence to Curaçoa and Bonair, and at and from thence back to New-York.

The declaration contained a special count upon the policy, together with the common counts for money.

Plea, the general issue.

The cause was tried before Mr. Justice OAKLEY: and at the trial, it appeared that the plaintiff had no interest in the vessel

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insured, except as the assignee of a certain charter-party, which had been made between the agents of the owners of the schooner and one Edmund Bulkley. The vessel, while on her voyage, was greatly injured by a storm, and had been driven by stress of weather into the port of Jacmel, in the Island of Hayti, where she was inspected and condemned as unseaworthy. There had been a due exhibition of the preliminary proofs to the underwriters, but they were objected to, as insufficient to establish a claim against the defendants.

By the terms of the charter-party, the amount to be paid for the use of the vessel, (\$1200,) was not to become due until after her safe arrival at New-York, although the owners were to receive an advance of \$100 at New-York, and a like sum at Curaçoa, if demanded.

At the trial, the plaintiff was non-suited by the Judge, upon the ground that his evidence did not show that he had any insurable interest in the vessel, he being a mere charterer, who was not bound to pay for the use of the vessel, except upon her safe return to New-York.

*Mr. J. Bulkley* for the plaintiff now moved to set aside the non-suit and contended, I. that the preliminary proofs were sufficient, and that the plaintiff could not be non-suited, on the ground that the defendants were entitled to ask for further preliminary proofs. [*He cited Phil on In. p. 54.*]

Secondly, that the evidence exhibited an insurable interest in the plaintiff, for the charterer was to advance a part of the hire of the vessel: [4 *Dall.* 459.] but if not, then the defendant was entitled to recover back his premium.

*Mr. Ogden Hoffman* contra. [*He cited Cheriot v. Barker, 2 John. R. 346., and Riley v. Delafield, 7 John. R. 526.*]

JONES C. J. delivered the opinion of the court.

This is a motion to set aside a non-suit at the trial, for want of proof of interest in the assured. The action was upon a policy

of insurance on freight by the assignee of the charterer of the vessel. The charterer is the party, who is to pay freight, and his obligation to pay does not become absolute until the safe arrival of the vessel. He runs no risk of loss during the voyage, and consequently has no interest to protect by insurance. The owner of the vessel has the insurable interest in the freight and not the charterer, who is to pay it.

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But a part of the freight is said to have been advanced. The advance of the freight gives no right to insure beyond the amount of the advance; and where the owner of the vessel is liable to refund in case of loss, his right to insure that amount—resulting from the lien the charterer has, upon the freight for his security—requires, that proof should be made of the actual payment of the money alleged to be advanced. In most cases the charterer will have a lien upon the freight for the advances he makes the ship-owners, as his security against their inability to refund. That lien gives him an interest under the charter-party as, or in the nature of, a mortgage, which he may insure; and the better opinion seems to be, that he may insure it in general terms under the name of freight without describing it as a mortgage interest. But to enable him to recover, he must prove the fact of the advance. His covenant or agreement to make it is not sufficient. Possibly the presumption of actual payment from the express stipulation to pay at the home port, previous to the ship's departure, and the fact of the departure of the ship from thence on her voyage might be sufficient as preliminary proof; especially if the insurers make no objection for the want of proof of actual payment, but put themselves upon other grounds of defence. But the actual proof of the advance cannot be dispensed with as proof in chief on the trial. Now the case states that this non-suit was directed for want of evidence as preliminary proof, (and on the trial for want of proof in chief) of the interest of the assured in the freight. The plaintiff then went into proof in chief to show his right to recover. No claim was made to a return of premium for want of interest; but the plaintiff's demand was for a loss of

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freight upon an interest in advances, under the charter. No proof of any advance appears. The defect is insurable and the non-suit was right.

*Motion denied.*

[J. Bulkley, *Att'y for the plff.* Hoffman & Talman, *Att's for the def'ts.*]

NOTE.—HOFFMAN J. having been of counsel for the defendants declined giving any opinion.

JOSIAH DOW

*versus*

STEPHEN T. NORTHAM AND CHARLES COGGESHALL.

The plaintiff was the bail of one Windsor, and for the purpose of surrendering him, deputed one Carr to arrest W. at Newport, R. I., and bring him to New-York. Carr arrested W., and without the captain's knowledge, put him on board the steam-boat Chancellor Livingston, in order to bring him to New-York. The defendant, Coggeshall, (who was the master of the boat,) aided in some measure by Northam, (a part owner and passenger,) after the boat left the wharf, and when he discovered that W. was on board the boat against his will, put him and Carr on shore together, and refused to permit W. to be carried to New-York. In an action against the master and Northam, for a rescue, it was HELD, that the proof did not support the declaration, and the jury having found a verdict for the defendants, the court refused to set it aside.

THIS was an action on the case against the defendants, for rescuing out of the custody and control of the plaintiff, one Charles Windsor, for whom the plaintiff was bail.

The declaration contained two counts. The first count stated, that Windsor, being indebted to John McGregor, Thomas Darling, and Henry T. Curtis, had been arrested on the 27th day of Oct. 1827, by the sheriff of the city and county of New-York, by virtue of a capias issued out of the Supreme Court at the suit of the said McGregor, Darling, and Curtis. That the said Dow had afterwards become special bail for Windsor, against whom the

plaintiffs in that suit recovered a judgment, in the year 1828, for the sum of \$1075,64, at the May term of the Supreme Court.

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That afterwards, as Windsor had not satisfied the judgment, the plaintiff "made his certain deputation in writing, under his seal, to one Robert R. Carr, and attached the said deputation to a copy of said bail-piece, attested in due form of law," by which the plaintiff authorized and empowered Carr to take Windsor, and surrender him to the sheriff of the city and county of New-York, "in exoneration and discharge of the said plaintiff as bail for the said "Windsor." That Carr, by virtue of said deputation and bail-piece, afterwards, viz. on the 12th day of August, 1828, at Newport, in the state of Rhode Island, "took and arrested the said Charles Windsor, and had him in custody for the purpose of surrendering him" "into the custody of the said sheriff." That the defendants, nevertheless, well knowing the premises, to prevent the plaintiff from surrendering Carr, "*rescued the said "Charles Windsor from and out of the custody of the said Robert "Carr, and caused the said Charles Windsor to escape and go at "large; and the said Charles Windsor did thereby then and there "escape and go at large, out of the custody of the said Robert R. "Carr, wheresoever he would."*

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The *second* count differed from the first in nothing except the allegations, "that the *plaintiff*, having a copy of the bail-piece, arrested Carr at Newport, and had him in custody, and that the defendants rescued Windsor "*out of the custody of the said plaintiff*," and caused him to go at large, &c. By which means the plaintiff could not surrender Windsor in exoneration of himself as bail, had become *liable* to pay the amount of said judgment, and had been *obliged to pay* "divers sums of money in and about a certain suit commenced and prosecuted by the said Mr. G. D. and C. against" the plaintiff, and "deprived of the means of recovering the costs and charges incurred" in and about the arrest of the said Windsor, &c.

The defendants appeared by separate attorneys, and severally pleaded the general issue. To the plea of the defendant Northam, there was attached a notice of the special matters upon which he intended to rely at the trial. This notice contained

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some of the principal facts proved at the trial, and the additional one that Windsor had been arrested and held to bail in Newport also, and that the defendant Coggeshall had been warned not to take or carry Windsor beyond the custody and controul of the bail last mentioned.

The cause was tried before the Chief Justice. At the trial the plaintiff called Franklin S. Kinney, Esq., his attorney in the cause, as a witness, who testified that on the 12 of August 1828, he together with the said Robert R. Carr, and Charles Windsor, went on board the steam boat, Chancellor Livingston, while she was taking in passengers at a wharf in Newport, and on her way from Providence to New-York. That Carr then had Windsor in his custody, by virtue of a copy of the bail-piece, duly authenticated, which is mentioned in the declaration, and a letter of attorney or deputation attached thereto, whereby he was authorized to arrest Windsor, and carry him to the city of New-York, in order to surrender him there in exoneration of the plaintiff as bail. The witness further stated, that he was then acting as the attorney of Dow the plaintiff, and that he together with Carr and Windsor went on board the Chancellor Livingston, from a small boat upon the outside of the steam-boat as she lay at the wharf. That the parties adopted this mode of getting on board from fear of a disturbance, if they carried Windsor through the streets of Newport for the purpose of transporting him forcibly to New-York. That the defendant Coggeshall was the Captain of the steam-boat and then had charge of her, and that Northam seemed to have a principal controul over the boat, and assisted in receiving the passage money. The witness did not know whether the captain saw the party in the small boat when they came on board, or was aware of their intention to do so, until after they were on board. That after the steam boat had left the wharf and had proceeded about a quarter of a mile on her way towards New-York, some of the passengers informed the captain that Windsor was on board, against his will, and that as he was desirous of being landed, they advised the captain to put him on shore. That thereupon Coggeshall concluded to send Windsor on shore in a small boat and ordered it to be prepared for that purpose, but the witness ob-



jected thereto, and showed the captain the copy of the bail-piece and the letter of attorney, which he perfectly understood. That Coggeshall however, being advised by Northam to do so, persisted in his intention to send Windsor on shore in the small boat, while the witness and Carr held Windsor to prevent him from going into the boat. That the captain thereupon called up his men and threatened to use force to put Windsor on shore, which induced the witness and Carr to release Windsor who immediately went into the small boat followed by Carr. That the witness was also requested to go on shore in the small boat, but he declined to do so; and Windsor and Carr were landed alone at Fort Adams, in the harbour of Newport.

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The witness directed Carr after he had got into the small boat to bring Windsor to New-York by some other conveyance, and Carr took with him the copy of the bail-piece and deputation when he was put on shore. Mr. Kinney further testified, that as he did not leave the steam-boat, he did not know whether Carr did or did not exercise any controul over Windsor after he left the boat; that the plaintiff afterwards, upon affidavits, obtained an order from the Supreme Court, allowing further time for the surrender of Windsor, upon the payment of costs, and that the expenses attending the same were about forty or fifty dollars, the precise amount not being ascertained. The witness further testified that the expenses incident to the taking of Windsor, and putting him on board the steam boat including counsel-fees, amounted to \$75. 50, which had been paid, besides \$20, to Carr, which had not been paid. The counsel for the plaintiff then enquired of the witness whether the time for the surrender of Windsor had not so nearly expired on the said 12th day of August, as that the said steam boat afforded the last and only opportunity of carrying him to New-York in season for his surrender, within the time limited by law, and whether in fact, it was practicable by any other means to produce Windsor in New-York in time to make a due surrender of him in exoneration of his bail. This question being objected to by the defendants, was overruled by the Chief Justice.

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The plaintiff then called another witness, who corroborated Mr. Kinney's principal statements, and testified in addition thereto, that Kinney and Carr were so anxious to keep Windsor on board, that Mr. K. offered to indemnify the captain, if he would carry the debtor to New-York.

The defendants called several witnesses, who testified that there was a great deal of excitement on board the steam boat when the passengers found that Windsor was detained forcibly on board: that captain C. refused to carry him to New-York, and ordered Kinney, Carr, and Windsor, all into the small boat. He said, as they had all come together, he wished them to depart together, and called the passengers to witness his proceedings. Carr and Windsor went into the boat, but Kinney refused to go. He remained in the steam boat and directed Carr, after he was in the small boat to hold Windsor, and bring him to New-York, saying that he would pay all his expenses. By the testimony of the defendant's witnesses, it did not appear that Northam was more active in the matter than the other passengers, but there was some slight evidence to show that he was one of the owners of the boat. The passage money, however, was received by the Captain's Clerk, who testified that Mr. N. did not seem to take any part in the matter.

It appeared further, that the Chancellor Livingston was a regular passage boat, plying between New-York and Providence, and that it is not customary for the passengers to ask the Captain's leave when they go on board, or to pay their passage money until after the boat has put off from the wharf.

Windsor was very willing to be put on shore at Fort Adams, and was unwilling to proceed to New-York.

The Chief Justice charged the jury, that the plaintiff's action was founded upon an alleged *rescue*, by the defendants, of Windsor from Carr, who had him in custody on a bail-piece. That to constitute a *rescue*, in the legal sense of the term, the party rescued must be under a legal arrest, or rightfully held in custody, and must be wrongfully set at large, or freed from detention by the rescuer. That in his opinion, the evidence did not sustain

that charge, as there was no intention manifested by the defendants, or either of them, to set Windsor at large, or to liberate him from the power or custody of Carr, nor was there any attempt made to *separate* them. The captain, it was true, refused to permit Windsor to continue on board, and insisted upon putting him on shore ; but he did not prevent Carr from going with him, and Carr actually accompanied Windsor on shore. That if the captain's refusal to carry Windsor to New-York, and the act of putting him on shore, exposed the captain to *any* action, (concerning which he expressed no opinion,) still the facts disclosed would not sustain an action for a *rescue*. That if the views taken by him of the evidence should be embraced by the jury, their verdict would be for the defendants; but if they should be of opinion from the facts disclosed, that Windsor was set at large from the arrest, or was taken out of the power of Carr, or if the latter was prevented from exercising his lawful authority over him by the defendants, or either of them, then their verdict ought to be in favour of the plaintiff, for \$75.50, and such part of the forty dollars as they judged proper—they being at liberty to convict *one* defendant and acquit the other, if they thought the evidence would support such a verdict.

The jury, without leaving the box, found a verdict in favour of *both* defendants.

*Mr. Geo. Sullivan*, for the plaintiff, now moved for a new trial, on the following grounds :

I. That the verdict was against the evidence and against law. The Chief Justice mis-directed the jury, by instructing them that the evidence was to be applied to the issue, as if the plaintiff in his declaration had counted on a *technical rescue* ; whereas the action was in truth brought for an *unlawful interference* on the part of the defendants, with the plaintiff's custody of the person of the debtor, for whom he was bail.

II. There was sufficient legal evidence of an *unlawful interference* on the part of the defendants with the plaintiff's right of

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custody over the person of the debtor: but the presiding Judge informed the jury that there was no such evidence. Even if there was no evidence to support the *first* count, still the second count was fully sustained. Windsor, in contemplation of law, was in the custody of the plaintiff, through the intervention of his agent, Kinney. For although the *deputation* was to Carr, that did not take away from the agent the right to represent his principal, and to detain Windsor himself. The Chief Justice put the defendants' liability exclusively upon the ground of their *intention* to set Windsor at large, or liberate him from the power or custody of Carr; whereas, the liability of the defendants in law, rests upon the fact of their *interfering* with the plaintiff's controul over the person of the debtor, whereby he was prevented from surrendering him to the sheriff.

III. The presiding Judge, by omitting to direct the jury as to the right of the plaintiff to bring the debtor, by the steam-boat, to New-York, under the circumstances of the case, left the jury in ignorance of the plaintiff's legal rights, and gave them ground to infer that the defendant, Coggeshall, could not have brought Windsor to New-York in his boat, without subjecting himself to damages for a false imprisonment; whereas Windsor having made no application to the captain before the vessel left the wharf, could not have recovered against the captain or the owners of the boat, even if he had been brought to New-York.

IV. The direction of the Chief Justice was uncertain in respect to the ground on which the jury were required to return their verdict, so that they could not distinctly understand whether they were to return a verdict for the defendants on the ground, that no technical rescue was sufficiently proved, or because Windsor was not in fact liberated from the plaintiff's custody, or upon the ground that the defendants did not *intend* to set him free. The jury were in fact left to infer that the captain and owners of the boat had a legal right to put Windsor and Carr on shore, and that therefore the defendants could not be liable in this action, and it is not clear

from the charge but what the jury returned their verdict upon this ground.

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*Mr. Greenwood and Mr. W. T. McCoun*, the counsel for the defendants, were stopped by the court, in their reply.

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*Per Curiam.* It is very clear that this motion cannot prevail. The plaintiff, in *both* counts of his declaration, has brought his action against the defendants for having *rescued* Windsor out of his power. The first count alleges that the debtor was in the custody of Carr, a special agent deputed by the plaintiff to arrest him, and that he was taken out of the custody of Carr. The second count differs in no respect from the first, except by alleging that Windsor was in the custody of the plaintiff, and was *rescued* out of his hands and control by the defendants. Now the plaintiff's own evidence shows that there was no *rescue* whatever, no separation of the parties, no sundering of the debtor from the party having charge of him. If the plaintiff was represented by Carr, then the debtor was left under his controul; for both went on shore together, and so far from being separated, they were in fact kept together. If, however, Kinney was the representative of the plaintiff, still there was no rescue, because Kinney was expressly requested to retain the custody of Carr, by going into the small boat with him. If the plaintiff himself, through his agent, voluntarily abandoned the debtor, he surely cannot charge the defendants with having rescued him.

The plaintiff, if he has any cause of action against the defendants, has manifestly mistaken his remedy. He should have framed a count to correspond with his proof, and if the captain was bound to bring Windsor to New-York, and refused to do so, he should have been charged with the act, which he in fact committed. If we treat the second count as a declaration in case, for sending Carr and Windsor on shore, that will not assist the plaintiff; for the proof shows no damage from *that act*, and therefore the *gravamen* of the declaration would not be supported.

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The Judge charged the jury expressly to say by their verdict, whether Windsor was in truth set at large or not, and they have found, upon that point, against the plaintiff. Their verdict is fully supported by the evidence, and the motion must be denied.

*Motion denied.*

[F. S. Kinney, *Att'y for the plff.*

J. Greenwood, *Att'y for Northam*, S. D. Hewlett, *Att'y for Coggeshall.*]

JOHN TURNBULL & MICHAEL PHYFE.

*versus*

ROBERT TROUT.

Where the *maker* of a promissory note *endorsed* the same for his own benefit in the payee's name, by virtue of a parol authority for that purpose communicated to him by the payee, it was held to be well endorsed; and that the payee was liable upon such endorsement, in the same manner, as if it had been made by himself with his own hand.

It is not necessary that the *authority* by which one person executes a written agreement for another and in his name, should be in writing also; although such written agreement may not be for the benefit of the party bound by it.

**ASSUMPSIT** brought by the holders of a promissory note against the defendant as endorser. The note purported to be drawn by one Richard H. Arnold in favour of the defendant, and to be by him endorsed. Plea, the general issue.

Upon the trial, it appeared that the note was not endorsed by the defendant *with his own hand*, but his name had been written upon it by the maker, *for his own benefit*, with the assent of the defendant, and by virtue of a parol permission or authority, for that purpose communicated to him by the defendant.

Under these circumstances, the counsel for the defendant contended, that a *parol* authority to endorse a note, given to pay the debt of another person, was void under the statute of frauds. But

the presiding Judge (HOFFMAN) charged the jury, that if they believed that the defendant had given to the maker of the note authority to endorse it for him and in his name, that then the plaintiffs were entitled to recover, notwithstanding the authority was communicated by parol.

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The jury found for the plaintiffs and the defendant's counsel took exceptions to the charge of the Judge.

*Mr. J. Anthon* for the defendant now moved for a new trial and contended,

I. That the authority to sign the name of the defendant as proved in this case, was void by the statute of frauds. The parol authority was void in itself; for it would be a most mischievous evasion of the statute, if the *authority* might be communicated by *parol*, while the statute requires the *agreement* to be in *writing*. [10 *Ves.* 311. 18 *Ves.* 509. 1 *Esp. R.* 106. 2 *Coun.* 203. 7 *T. R.* 207. 7 *Mass. R.* 233. 1 *Marsh, R. (Kentucky)* 436. 2 *Stark,* 606. 1 *Sch. & Lef.* 22, 27. 31.]

II. The authority was communicated to a person not capable of exercising it: it should have been given to some *third* person, and not to the party who was to receive the benefit. [5 *Barn. & Ald.* 333. 2 *Camp.* 203.]

*Mr. W. H. Bell* for the plaintiffs.

This is not a case which falls within the statute of frauds, in any shape. It is not a collateral undertaking to pay the debt of another; but it is, in contemplation of law, a new and distinct promise from the endorser to the endorsee, for a proper consideration, to pay the note, if the maker did not. The undertaking of the endorser of a note, payable to order, is not to be considered as collateral, even if the endorsement were granted for the sole accommodation of the maker; for the note, when endorsed, is sent into the market, and becomes

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negotiable; while a mere *collateral* contract can have no such currency.

The fallacy of the argument on the other side consists in supposing that this is a promise to pay the debt of *another* person. The payee of the note is supposed to have endorsed it for a consideration received by him of the endorsee, and he becomes the drawer of a new bill upon the maker. His promise to pay is *conditional*, but not *collateral*: he stands not in the light of a mere surety, but as an original undertaker to pay the amount of the note, if the maker refuse.

The maker of the note in this case, was the agent of the payee to endorse the same; and it is admitted by the counsel for the defendant, that if the authority given to the agent for this purpose had been in writing, it would have been sufficient.

Now there is nothing in the statute of frauds relative to the manner in which a principal must communicate his power to an agent; and it is well settled that the authority may be imparted in any manner susceptible of explicit proof. Suppose it were proved that a merchant was in the habit of allowing his clerk to endorse and negotiate notes received by him in payment for goods; would he not be bound by such endorsement, unless the holder could prove that the clerk had an *express* authority for this purpose *in writing*?—The argument for the defendant, when pushed to its consequences, proves too much, and it is evident, that a case like the present, cannot be within any of the objects of the statute.

JONES, C. J., delivered the opinion of the court.

This is an action of *assumpsit* on a promissory note by the holders, against the endorsers. The note was made by one Richard H. Arnold, for the payment of \$169 89-100, to the defendant ninety days after date, and dated January 19th, 1828.

It was admitted that the name of the defendant endorsed upon the note, was not written by the defendant himself, but by Arnold, the maker. And it was alleged, that the same was so written and endorsed by Arnold, with the assent and by the authority of the defendant, and proof was offered to show the authority.



One witness testified to the admission of the defendant, that he had authorized Arnold, the maker, to endorse his name upon the note, and that if it had been brought to him, he would have written his name upon it himself. Some evidence was offered on the part of the defendant tending to show that this conversation had reference to a different note: and evidence was also produced by the plaintiff, conducing to the conclusion that the maker had the authority of the defendant to make the endorsement. The question upon the testimony was left to the jury, who gave a verdict for the plaintiff, thereby establishing the fact, that the note was endorsed by the authority of the defendant, and the point on which the defendant now relies for his defence is, that a parol authority to endorse a note for the debt of a third person, which he affirms this to be, is void under the statute of frauds. This point was raised at the trial, and overruled by the judge, and it now comes before us on an exception to his opinion.

I state the exception in the terms of the case; but it is observable, that the facts disclosed to us do not bear out the position it assumes, that the note in question was given for the debt of a third person, within the meaning of the statute. On reference to the case, it appears that the note was drawn by Arnold in favour of Trout, the defendant, and passed by the maker with the name of Trout upon it, as endorser to the plaintiffs—for what consideration, whether in payment of an antecedent debt, or for value received upon the credit of the paper itself, at the time of the negotiation for it, does not appear. But it is a negotiable note in the hands of an endorsee, and in the absence of all proof to the contrary, must be taken to have been negotiated by the maker for value in the usual course of business, and the question will be whether payment of such a note can be successfully resisted by the defendant on the ground taken upon the argument.

In support of the objection, it is contended, I. as a general proposition, that the engagement of the endorser of a promissory note, is a collateral undertaking within the statute, to answer for the debt of another, and to be obligatory, must be in writing.

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II. That the authority of an agent to endorse for his principal must also be in writing, as a parol authority would introduce the very mischief against which the statute is intended to provide.

III. If such parol authority is good, it can only be so when given to a third person, who is not to be benefitted by the exercise of the power; and from these premises the conclusion is drawn, that the authority in this case being by parol and to the person, whose debt the endorsement guaranteed, that authority was invalid.

I cannot accede to the views taken by the defendant's counsel of the nature of the endorser's engagement, nor to the opinion, that the authority to endorse the note was void, because it was by parol. The only engagement of the endorser is for the payment of the note he endorses; and when he is the payee, (as, in the regular course of negotiating, the first endorser generally is,) the note is payable to himself, and is his own debt. When he transfers it to another by endorsement he assigns or passes over to his endorser the note or debt thus due, and payable to himself; and the legal effect of his endorsement is to superadd his own personal obligation as endorser for the payment of the note to the endorsee.

This is the process and legal operation of the transfer of the note by endorsement as between the maker, the payee and the endorsee of the note. And to this pure unimixed case of the note of a maker to a payee and endorsed by the payee to an endorsee, who continues as the holder, we must look for the true nature and legal effect of the engagement of the endorser. In it no feature of an undertaking of the endorser to answer the debt of a third person within the meaning of the statute for the prevention of frauds, is discernable. It is the transfer in such cases permitted by law, of the debt (which the note makes payable to him,) by him to the transferee; and the obligation the endorsement creates is, that the debt thus transferred by him to the endorsee, in case of the non-payment of the maker at the maturity of the note upon demand, shall upon due notice of the maker's default be paid by him (the endorser) to the holder. There is no debt due, or owing, or about to be contracted by the maker of the note to the endorsee, for which the payee thus gives his en-

dorsement. The first connection the endorsee has with the note is the negotiation and transfer of it to him, for the value he then pays for it : and that value he gives for the endorsed note, as he receives it with all the engagements and liabilities of the parties to it—as well endorser as maker—for the payment of its contents.

Such was in effect the negotiation of this note to these plaintiffs. They received the note, it is true, from the maker, and not from the payee. But the payee having made the maker his agent for the negotiation of the paper with his endorsement upon it, the negotiation of it by the agent was the same as respects the defendant—his constituent, as if he had conducted the negotiation himself in person. Or, if the circumstance differs, the case it makes is still stronger against the defendant. It is in evidence that the note was endorsed by the defendant for the accommodation of Arnold the maker, by Arnold himself, as the agent of the defendant, and was negotiated with the name of the defendant upon it as endorser, by Arnold to the plaintiffs for his own benefit. The negotiation was necessarily of the entire endorsed note, for a consideration to the maker. The delivery of the note to the plaintiffs gave it no vitality as operative negotiable paper. The only aliment for the promise of the maker, or the engagement of the endorser, was the consideration paid for the note by the plaintiffs. And the endorsement was, under such circumstances, emphatically an original engagement of the defendant, as endorser to the plaintiffs, for the payment of the contents of the note.

The case of *Ulen v. Kittridge*, 7 Mass. 233. was that of a guaranty by the defendant of his promissory notes, made by one Eliphalet Butman, for one hundred dollars each, payable to Alen or order. The plaintiff declared upon the guaranty, and averred, that in consideration of his forbearance (by his agent) to sue until his return from sea, the defendant promised to guaranty the payment of the notes. It appeared in evidence, that the notes had been left in the hands of an agent for collection during the plaintiff's absence at sea ; that after many fruitless applications to Butman (the maker) for payment, he was notified that the notes would be put in suit, unless they were paid, or the payment of them secured : that Butman and the defendant thereupon went together to the

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agent, when Butman offered the defendant as surety, and the defendant consented to become security for the money, on condition, that the agent would forbear to sue Butman, the maker, on the note, until the plaintiff's return from sea. To this condition the agent acceded, and the defendant, for the purpose of the intended security, endorsed the notes. This, then, was a plain case of a guaranty or collateral undertaking of Kittridge, the defendant, to answer for the antecedent and subsisting debt of Butman, for the consideration of the forbearance of that debt by the plaintiff, who was absent at the time, until his return from sea. It has no resemblance to the case now before us, which is purely the case of the transfer of negotiable paper to the plaintiffs for value, in the usual course of dealing, by endorsement.

The rule is too well settled to be now shaken, that a negotiable promissory note like the present, in the hands of an innocent holder, who takes it in the usual course of negotiation, for a valuable consideration, without notice of any equity or secret trust to it, is obligatory and conclusive upon all the parties, whose names appear upon the paper, and cannot be affected by any of the considerations which belong to collateral engagements for the debts of third persons. Nor can the facts or circumstances (necessary to be shown for those considerations to arise) be inquired into or shown by the endorser in his defence against his endorsement.

But if the engagement of this defendant could be brought within the statute, its obligation could not for that reason be avoided; for it is in writing, and the sufficiency of the writing has not been drawn in question. The only view in which the application of the statute to the endorsement could be material, is the bearing it may be supposed to have upon the second point, which predicates of an authority to endorse, that it must be in writing, because the statute is supposed to require the endorsement itself to be in writing, and a parol authority to endorse would introduce the very mischief, against which the statute was intended to provide. But if the engagement of the endorser is not within the act, if the endorsement of the payee of a negotiable promissory note, (passed in the course of negotiation to an endorsee in good

faith, and for a fair and valuable consideration,) is in judgment of law an original undertaking to which the provisions of the statute have no application, it must follow, that the special grounds insisted upon by the counsel (in the second point) for requiring the authority of the agent to endorse for his principal, to be in writing, (deduced from the provisions or policy of the statute,) must fail him, and the question will stand upon the general principles of law and commercial usage, applicable to the relation of principal and agent.

Tested by these rules, can there be a serious doubt on the point? In an anonymous case in 13 *Mod. R.* 564. it was expressly ruled by Lord Chief Justice HEAT, that an authority to endorse a bill of exchange, in another person's name, may be by parol. This rule has often been recognized by judicial opinions, and its soundness has never, I believe, been questioned. But the principle of the rule is admitted. It is conceded, that the delegation by one person to another, of the power of contracting for him, and of signing the name of the constituent to the contract, may be by parol, except in cases to which the statute for the prevention of frauds is held to apply. If I am right in the views I have presented of the case, that exception, if admitted, would be of no avail to the defendants. But I am not able to discover any solid ground for the exception. And whether the engagement of an endorser is to be deemed an original undertaking to the endorsee, for a debt or responsibility of his own, or a collateral engagement to answer for the debt of the maker, and as such (within the statute) a parol authority from the endorser to the maker to endorse the note for him, would in either case be valid in law, and sufficient to charge the constituent with a liability as endorser of the note, however desirable it might be, that the authority of an agent who acts for the principal in cases which fall within the statute, should be in writing. The 11th section of the statute, which relates to collateral undertakings for the debts of third persons, does not require it, and the uniform construction of the courts has been, that the power of the agent in such cases may be by parol.

In the case of *Clinan v. Cooke*, [1 *Sch. & Lef. p.* 22.] the leading question was upon the sufficiency of a parol authority to enable the agent to bind his principal by an agreement

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for a lease, and the counsel for the defendant strenuously contended against its sufficiency, insisting that where an authority is given to another to enter into a contract of this description, it must be in writing. But the Chancellor observed, that there was no foundation for that position; that the words of the statute of frauds do not import any such thing, and that there are decided cases to the contrary. He referred to a case as a precise determination in point, which he said was decided in perfect conformity to the statute.

The case referred to by the Chancellor was that of *Barry v. Lord Barrymore*, before Lord LIFFORD, in Chancery, Michaelmas term, 1770, cited by counsel as furnished by Mr. Fitzgerald, from Mr. Malone's Notes. In that case, the bill was for the specific execution of an agreement for a lease made by one Underwood, the agent of the defendant. The defendant put in a plea under the statute of frauds to this effect, that the defendant did not put in writing any contract or agreement for making the lease mentioned in the bill, nor lawfully authorise in writing Underwood or any other person as agent for him to make or sign any agreement in writing for any of the lands in the bill, or any memorandum or note for making any lease, otherwise than as the defendant had set forth. The Chancellor held the plea to be evidently bad, because the defendant said that he did not authorize "*in writing*;" he held, that the statute does not require the authority to be in writing, and therefore the defendant was not within the statute.

The earlier case of *Walker v. Hendon and Cox*, [5 Vin. 524. Pl. 45. is to the same point. It was an appeal from the Rolls, in 10th Geo. I. (1724.) The case was, that Hendon, as agent for Cox, entered into a contract in writing with the plaintiff for the purchase of a college-lease, and the bill was against both the principal and agent for a balance due of the purchase money. The decree at the Rolls was against both to pay the money, and in case Hendon should pay it, then he to be at liberty to prosecute the decree in the name of the plaintiff against the other defendant Cox, who was the principal. Cox appealed, for that he did not give any authority in writing to the defendant Hendon to *buy the lease* for him, and therefore, by the statute of frauds, he ought not to be held by the contract. But MACCLESFIELD, Chancellor, af-

firmed the decree, holding that the authority to treat or buy for him, may be good without writing, though the contract itself must be in writing by the statute. The case of *Mortlock v. Buller*, [10th *Vesey*, 292.] and *Deverell v. Lord Bolton*, [18th *Vesey*, 505,] cited by the defendant, are both cases of agreements of agents acting under a parol authority of the principals. They show that the agent must be fully and clearly empowered to bind the principal by the contract, and must keep strictly within the line of his authority : but the Chancellor, in each case, distinctly recognizes and admits the rule that the authority may be by parol, though the agreement must be in writing. In the case of *Clinan v. Cooke*, before referred to, the question was fully considered in all its bearings, and received an unqualified determination, which fully settled the competency of a parol authority to enable the agent to bind his principal by his contract, and the obiter opinions of the two judges in the only case in which a contrary doctrine appears to have been advanced, were exploded and overruled.

In the case of *Ulen v. Kittridge*, [7 *Mass. Rep.* p. 233,] as we have already seen, the defendant became the guaranty for the payment of two promissory notes given by one Pitman to the plaintiff, by writing the name of him, the defendant, upon them after they had fallen due upon the consideration of the forbearance of the plaintiff to sue the maker upon them. It was objected that the indorsement or guaranty of the defendant being an undertaking to pay the debt of another, he could not be charged upon the promise because there was no consideration for the guaranty or agreement expressed in writing. To which it was answered, that the forbearance to sue was a valid consideration, and was sufficiently expressed in the agreement, and would be considered at the trial as if written over the defendant's name, by the witness as his agent, authorized thereto by parol. And the court held, that the defendant's signature upon the back of the note was the authority given by him to write over the signature a sufficient guaranty, and such guaranty being accordingly written pursuant to the authority, might be considered as a memorandum signed by the party, within the intent of the statute, as fully as if it had been written in the defendant's presence, immediately after the signa-

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ture, and that a parol authority to the agent to fill up the blanks was sufficient in law, and parol evidence was admissible to prove such parol authority.

In the case of *Merritt against Clason*, [12 John. R. p. 102.,] it was conceded by the counsel, and assumed by the court, that the authorization of the agent under this section of the act, need not be in writing. In that case, Townsend the broker, who was held to be the agent of both parties, acted under a parol authority solely, and the sufficiency of his authority to bind the parties by his memorandum in writing, of the agreement was expressly admitted. In the case of *Coles v. Trecothick*, [9 Ves. p. 249.,] and other equity cases, a written authorization of the agent to write out the contract for the principal, was held unnecessary, and this rule was recognized and sanctioned by the English Court of Common Pleas, in the case of *Emmerson v. Heelis*, [2 Taunt. p. 46.,] and by Chancellor Kent in the Court of Chancery of this state, in the case of *McComb v. Dwight*, [4 John. Ch. Rep. p. 659.] In commenting on the case from Taunton, the Chancellor approves of the conclusion of the Court of Common Pleas, that the auctioneer is an agent of the purchaser, and a contract signed by such agent is binding, and that an agent for the buyer need not be authorized in writing. The same rule of construction must apply to the authority of an agent by whom the principal contracts, and becomes answerable for the debt of another, which comes within the same section of the act.

These precedents exhibit a clear, strong and uniform current of judicial opinion for more than a century, in the English Court ; and of those of this state, since its organization as such, in favour of the sufficiency of the parol authority of the agent to sign for his principal ; and we cannot against such an unbroken series of decisions in support of it hold it invalid.

The remaining objection to the validity of the authorization in the present case, because it is given to the maker of the note, whose debt was to be guaranteed, is clearly untenable. The interest of the party in the endorsement does not disqualify him for the agency, if the principal is willing to trust him with the powers



it confers. It was the intention and design of the defendant to lend the maker of the note the use of his name, as endorser of his paper, and it was but the further proof of his confidence in him, to confer on him the authority to make the endorsement. The agent at the same time he bound him as endorser, must bind himself as maker of the note, and thereby oblige himself to reimburse to the principal the money he might be compelled to pay for him as endorser. And the principal if he confided in the integrity and the solvency of the person he intended to befriend, might be willing to commit to him the charge of showing the extent of the liability. The interest of the maker of the note in the endorsement, and the temptation he would be under to abuse the power, if allowed to prove it, would be a strong objection, and perhaps conclusive against his competency as a witness to establish his authority to endorse. But in this case, his authority is proved by other testimony, and he is not called to establish it by his own oath. I see no solid reason against his capacity to act as agent under either a written or a parol authority. His interest in the endorsement cannot disable him, for the debt created by the indorsement continues against him as maker; and his authority is conferred upon him by the party himself, who alone is to suffer by the act.

The cases cited by the counsel to this point have no application. The case of *Wright v. Wardle*, [2 *Camp.* p. 200.,] was an action for the price of furniture supplied the witness, at the request, and on the credit of the defendant. The witness to whom the goods were furnished, and who was then the owner of them, was called to prove that the credit was given to the defendant, and it was objected, that she was not a competent witness without a release, as the goods were furnished to her, and she was *prima facie* liable for them, and had a direct interest to fix the liability on another. She was on that ground rejected.

Another point was made by the plaintiff on the argument which it may be proper to notice. It was contended that the subsequent assent of the defendant to the endorsement, and his promise to pay the note was a waiver of any exception that otherwise might have been taken to the sufficiency of the authority to endorse; and the cases from 2 *Camp.* p. 450., and 5 *Esp.* p. 180., were cited

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in support of the proposition. I incline to the opinion that this case comes within the principles of those cited by the counsel, and that the defendant ought upon principle as well as precedent, to be precluded from the benefit of a defence which appears from his own admission, not to be very meritorious, and which he so clearly appears to have waived. But my opinion being in favour of the plaintiffs upon the other points of the cause, it will not be necessary to enter more fully into the consideration of this; therefore, the motion for a new trial must be denied.

*Motion denied.*

[W. H. Bell, *Att'y for plff.* E. Anthon, *Att'y for def't.*]

NOTE.—Vide *Shaw v. Nudd*, 8 Pick. Rep. 9.

#### HENRY D. SEWALL *versus* HENRY RODEWALD.

Although the general rule is, that demands growing out of partnership dealings, cannot be set off against individual demands on one of the partners, yet a special agreement for that purpose may of course be made which will be binding on the parties, and entitle the defendant to the set off claimed.

THIS was an action of *indebitatus assumpsit*, brought by the plaintiff as the surviving partner of the firm of H. D. & C. B. Sewall, to recover a balance of account, due that firm from the defendant, or the amount of certain advances made by his order. The declaration contained the common Counts, for money paid, money lent and advanced, for goods sold, &c., and a count upon an *instimul computassent*. Plea the general issue.

The cause was tried before Mr. Justice OAKLEY, on the 9th day of October, 1828. At the trial it appeared, that the plaintiffs were merchants, residing in New-York, that the defendant was a merchant in Baltimore, and that he had a brother residing in Bremen, (Frederick Rodewald,) who was a commission merchant there, and with whom, both the plaintiffs and

the defendant had extensive connexions of business. There was no general partnership existing between these parties, but several shipments had been made by Frederick Rodewald from Bremen on the joint account of himself, his brother and the plaintiffs; and in the course of this business, the plaintiffs always gave credit to *the defendant*, for the net proceeds of the shipments made from Bremen on the joint account of all the parties.

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Frederick Rodewald was the owner of a ship called the *Louise*, and during the summer of the year 1826, he shipped a cargo, consisting of sheep, rags, glass &c., on joint account, which was received by the plaintiffs at New-York: and one John C. Dunte, an agent of Frederick Rodewald, applied to the plaintiffs to make a return shipment to him by that vessel. This they did, and charged the amount of their advance for that purpose to the defendant.

On the 26th of august 1826, the plaintiffs wrote to the defendant, and enclosed a copy of their account exhibiting a balance of \$5,497. 79 due to them; on the 30th of the same month they drew upon him for \$3000, and their bill was duly accepted. The defendant in reply, and in his letter of advice concerning the bill, desired the plaintiffs to send him "*a statement of the account of the ship Louise, so as to enable him to make the necessary entries.*" On the 6th and 8th of September following the plaintiffs drew, two bills on the defendant, one for \$1240. and the other for \$1257, 99, the two together amounting to the exact balance of their account.

These bills the defendant refused to accept, but stated that he had written them on the 28th of August 1826, "in words which could not be misunderstood" that he "would make provision to pay" the "plaintiffs the whole amount of their purchases for the *Louise* at maturity in New-York." He also added, that he had the more right to claim indulgence from the fact; that the plaintiffs had in their hands, "the goods per *Louise*, the proceeds of the sheep sold and those on hand as an additional security." As to the drafts, he promised, "*that due payment should be made*" to the plaintiffs "for them at maturity."

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In reply to this letter, the plaintiffs stated, that "the balance due on sheep, &c. by the Louise, after deducting expenses, would be but trifling;" but that as to the defendant's claim, "be it what it might," they "*were ready to make it good.*" It appeared, during the progress of the trial, that on the 7th day of July, 1826, the plaintiffs and Dunte had settled their accounts with Frederick Rodewald by an *agreement in writing*, and that a balance of 4,499, 33-100 was admitted by the agreement to be due to the latter from the former. Dunte testified that he was induced to make this settlement in *expectation of receiving* the balance, and for fear that the plaintiffs would fail. He also testified, that some time before this, the plaintiffs had insisted that they were *not* interested jointly with the defendant and his brother, in the sheep, &c. by the Louise, *and that he (the witness) had discharged them from all liability on account of that adventure.*

Upon this state of facts, the plaintiffs brought the present action. The defendant did not deny his liability to pay the whole amount of the plaintiff's advances to purchase the return cargo of the Louise, but claimed that he was to be credited with the nett proceeds of the shipment of sheep, &c. which Frederick Rodewald had made by that vessel for the joint account of all the parties.

The plaintiffs resisted this claim, upon the ground that their demand upon the defendant was for his own individual debt, founded upon his promise to pay the amount of their advances to purchase the return cargo of the Louise: that the adventure by that vessel was upon *joint account*, and being a partnership concern, could not be set off against the defendant's individual debt. A number of letters, accounts, and statements were spread before the jury by the plaintiff and by the defendant, and several witnesses were called to substantiate the positions assumed by the respective parties. But the facts stated are supposed to be sufficient to a correct understanding of the points of law.

The Judge charged the jury,

I. That they could not set off the proceeds of the adventure by the Louise, against the claim of the plaintiffs, unless they found

that they had made *an express promise* to credit the defendant with the amount of such proceeds. That they ought to be satisfied that there was an agreement to separate the cargo of the Louise from the general partnership accounts, or it could not be done.

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Secondly, that they were to consider whether such agreement, if made, was not altered or modified by any thing done subsequently by Henry Rodewald. If he had *authorized* the agreement made by Duntz, or afterwards assented to it, that then such off-set could not be made.

Thirdly, that if the set-off should be made, the account must be settled, for the purpose of ascertaining the amount of such set-off, in the same manner as if settled with the defendant, and Frederick Rodewald.

The jury found a verdict for the plaintiff for six hundred and six dollars and forty-five cents.

*Mr. J. Blunt*, and *Mr. R. Sedgwick* on behalf of the plaintiffs, now moved for a new trial and contended,

I. That the defendant was bound by his express promise to pay the balance of the plaintiff's account, as exhibited on the 25th of August, 1826.

II. The supposed agreement or promise of the plaintiff's mentioned in the charge of the Judge, to credit Henry Rodewald with the proceeds of the cargo of the Louise, was without consideration and not binding.

III. There never was any agreement on the part of the plaintiffs, to separate the cargo of the Louise from the general partnership concern, and the verdict was, in this respect, without evidence.

IV. In order to authorize the set-off claimed, it ought, at all events, to have been shown that there was an express or unqualified agreement that the same should be made, whatever might

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prove to be the state of the accounts to which Frederick Rodewald was a party or in which he was concerned.

V. If any agreement was made it was *waived*.

VI. After the agreement made with Frederick Rodewald, Henry R. had no right to interfere with the same, and he was bound by it, so far at least as F. R. was concerned.

VII. After that agreement, Henry R. could not claim any thing on account of the partnership transactions, except in a Court of Equity.

VIII. The debt claimed to be set-off was due if at all to Frederick R. and Henry R., it was not therefore a subject of set-off between the parties to this suit.

*Mr. J. Boyd* for the defendants *contra*, contended, that the Judge's charge was unexceptionable in point of law, and that the finding of the jury under the charge was fully justified by the evidence.

OAKLEY, J. The plaintiffs in this case were merchants residing in New-York; the defendant, a merchant at Baltimore; and Frederick Rodewald, a brother of the defendant, was a merchant residing at Bremen. F. R. owned the ship *Louise*, and several shipments had been made from Bremen by that and other vessels, on the joint account of the plaintiffs, the defendant, and F. R. There was no general partnership existing between them, but they were jointly interested in the particular cargoes shipped. In the general course of the business, the plaintiffs always gave credit to the defendant, for the nett proceeds of the shipments made by F. R. his brother, on the joint account of the then houses. In the summer of 1826, a cargo of sheep, rags, &c. by the *Louise*, was received at New-York by the plaintiffs, shipped by F. R. on joint account. One *Duntz*, the agent of F. R., applied to the

plaintiffs to procure and ship a return cargo by the *Louise* to F. R., which they did, and charged the amount of their expenditure on that account to the defendant, and drew on him for the same at Baltimore. The first draft was accepted; but a subsequent one was not. The defendant, however, promised to pay it at maturity, and not having done so, this action was brought on that promise, or for the monies expended by the plaintiffs in making the shipments to Bremen, they claiming to have made the same by the order of the defendant. The defendant admitted his liability to pay the amount of the draft, but claimed to be allowed, by way of set-off, the nett proceeds of the shipment made by the *Louise* from Bremen, then in the hands of the plaintiffs. The plaintiffs resist this set-off, on the ground that this demand on the defendant was for his individual debt due to them; and that the proceeds of the cargo from Bremen being on joint account, could not be set off against it.

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The Judge at the trial ruled that such set-off could not be allowed, unless an express agreement was proved to have been made by the plaintiffs, to credit the defendant with the amount of the said cargo shipped from Bremen. The defendant offered evidence to establish such an agreement, and the jury found a verdict for the plaintiffs, for the balance due them, after allowing the set-off. The plaintiffs now move for a new trial. There appears to me no ground to question the correctness of the decision of the Judge. Though the general rule is, that demands growing out of partnership dealings, cannot be set off against individual demands on one of the partners, yet it was never doubted, that a special agreement might be made for such set-off.

In the present case, the jury have found, as I think upon sufficient evidence, that such agreement was made by the plaintiffs. The assent of F. R. to the arrangement for crediting to the defendant the entire nett proceeds of the cargo, may well be implied from the fact, that it had been the constant course of the business for the plaintiffs to credit to the defendant individually, the proceeds of all shipments made on joint account by F. R. The plaintiffs, after agreeing to give the credit to the defendant,

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could not retract it, without showing that F. R. had interfered to disaffirm such credit, of which there is no evidence in the case.

The jury, in framing their verdict, appear, by a reference to the accounts annexed to the case, to have given the plaintiffs credit for the balance of their account-current with the defendant as stated by themselves, and to have charged them with the nett proceeds of the shipment from Bremen by the Louise. This was in accordance with the justice of the case, and the agreement of the parties, as the jury must have found it, on the evidence, and I therefore see no reason for disturbing their verdict.

*Motion for a new trial denied.*

[D. D. Field, *Att'y for the plff.* S. Boyd, *Att'y for the deft.*]



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The owner of a ship has, by the general rules of law, a lien on the cargo for his freight, although the vessel may be hired to another, provided he continues in the actual, or constructive possession and control of it. But if he part with his possession to a *charterer*, the latter is considered as the owner for the voyage, and the former has no lien for the freight.

By covenant of charter-party, the owner of the brig *Holly*, let her to the plaintiff for a voyage from Boston to the East Coast of South America, and back to Boston. The master of the vessel was to be appointed by the plaintiff; and he stipulated to pay the owner \$600 per month for the hire of the vessel, to pay all port charges and pilotage during the voyage, and to "deliver the brig" on her return to Boston, to the owner or his order.

The vessel proceeded to Rio Grande, and having delivered her cargo there, took on board another, partly the property of the plaintiff, and partly on freight for New-York. She likewise received the defendant on board at Rio Grande, as master for the homeward voyage. He was directed to proceed to New-York, and there deliver such part of the cargo as was taken on freight for that place; and then await the orders of the plaintiff. Among the articles taken on freight, was a quantity of hides, &c., consigned to one Whitlock of New-York.

Before the arrival of the vessel at New-York, the charterer became insolvent, and immediately on her arrival, the owner took possession. Whitlock paid the freight of the property consigned to him, to the defendant; and he, with full knowledge of the charter-party, and of the claims of the plaintiff, paid over the money to the owner of the vessel. Held, that the charterer might recover back the freight thus paid over to the owner, in an action of assumpsit against the master, the defendant. Held also, that the deviation of the vessel from the direct route from Rio Grande to Boston, for the purpose of delivering freight at New-York, could not be considered by the owner such a violation of the charter-party, as would authorize him to treat it as a nullity, resume the possession of his vessel at New-York, and claim a right of lien, for the freight of the goods found on board.

This was an action of assumpsit for money had and received by the defendant to the use of the plaintiff. The declaration contained all the usual money counts, together with a count upon an *in simul computasset*. Plea, the general issue.

The action was originally brought in the Supreme Court, but was transferred to this, by consent of parties, according to the provisions of the act.

At the trial, a verdict was rendered for the plaintiff, by consent of the defendant, for the sum of \$1,132,67 damages, and six cents

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costs, subject to the opinion of the court upon a case to be made.

The material facts admitted by the parties were these.

By a covenant of charter-party, bearing date the third day of June 1826, *Samuel Woods* of Boston the owner of the brig *Holly* of that port, chartered his vessel to Edward Lander of Salem, the plaintiff, for a voyage from Boston to the "East Coast of South America, and back to Boston." By the terms of the charter-party, the *owner* of the brig was to keep her tight, staunch, and strong, and "*pay the charge* of victualing and manning" her during the voyage; but the *master* was to be appointed by Lander, the charterer. It was also stipulated that the latter, his agents or factors, should have the right of putting on board the vessel, both at Boston and Rio Grande, such merchandise as they should think proper, contraband goods excepted.

Lander on his part, covenanted to pay Woods or his order, the sum of \$800 per month, (and in that proportion for a less time) in full for the freight or *hire* of the brig, *in thirty days after her return to Boston*. He also was to pay all port charges and pilotage during the voyage, and to *deliver* the brig, on her return to Boston to the owner or his order. There were also other conditional covenants, as to the purchase of the vessel, by Lander; but none of the stipulations in the charter-party are deemed material in the cause, except those already stated.

Shortly after the execution of the charter-party, the brig sailed on her voyage, having on board one Brace as master; appointed to that station by Lander, the charterer. She proceeded directly to Rio Grande on the East Coast of South America, and there delivered her outward cargo, which was the property of Lander. At Rio Grande, a homeward cargo was put on board, partly belonging to Lander and partly on *freight*. The vessel cleared for New-York and Boston; but was bound for New-York, at which place or Boston the goods were to be delivered. Brace remained at Rio Grande, and sent in his place as master, *Joseph W. Clarke*, the defendant in this suit.

The brig left Rio Grande with orders from Captain Brace, to proceed to New-York, and there, after delivering the freight taken for that place, await the orders of Lander. Among the articles

taken on board as freight, was a quantity of hides, hair, &c., shipped by one Richards at Rio Grande, and consigned to Wm. Whitlock, Jun. of New-York. The freight of these articles, amounted to \$1014,34.

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Before the arrival of the vessel at New-York, the plaintiff became insolvent: and the owner of the brig never received any of the money due on the charter-party, nor had he any security therefor, except what he claimed to have from the freight of the hides, &c., shipped to Whitlock.

Immediately upon the arrival of the brig at New-York, Woods the owner took possession of her. Whitlock, to whom the hides were consigned, paid the freight thereon to Clark, the master of the vessel and defendant in this suit. Clark, with a full knowledge of the charter-party, and of the rights and claims of the plaintiff, paid over the said freight to the owner of the brig.

Under these circumstances, this suit was brought to recover from the defendant, the master, the said sum of \$1014,34, together with interest thereon, from the day when he received the same.

With the case, the counsel for the parties, submitted the following points for the decision of the court.

I. Whether the owner of the brig, had a lien on the goods shipped on board, for the hire of the vessel, in virtue of the charter-party.

II. If not, whether in consequence of the brig's going to New-York, without necessity, to carry freight there, the charter-party ceased to be binding upon the owner of the vessel, so that he had a right to take possession of her at New-York, and by that means acquire a lien, or right to freight on such merchandize, as he found on board.

III. Whether the defendant ought to account to the plaintiff for the freight money received from Whitlock. The counsel for the plaintiff relied upon the case of *Pickman v. Woods*, recently determined in the Supreme Judicial Court of Massachusetts, [6 *Pick-*

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ering 248.] and the course of reasoning adopted by Chief Justice PARKER, in giving the opinion of the court in that case.

For the defendant it was contended, that as the charter-party had been disregarded by the charterer or his agent, and a new voyage from South America, substituted for that specified in the charter-party, it ceased to be binding on the owner of the vessel. The brig had been sent to New-York instead of Boston; and Woods, the owner, never parted with the possession of his vessel for a voyage to New-York. He had a right, therefore, to consider Captain Clark as his captain, on a voyage not within the agreement, and could demand his freight, independent of the charter-party, for that does not now apply. Under these circumstances, the owner has a claim on the goods for his freight, and the captain ought not to part with the possession until that is paid. [*Burgen v. Sharpe*, 2 Camp. 529. *Laves on Char. Par.* 64. 74. 80. 203. *Smith v. Wilson*, 8 East. 437.]

Mr. R. M. Blatchford, for the plaintiff.

Mr. Wilkes, for the defendant.

JONES C. J. S. Woods of Boston, the owner of the Holly, chartered her to the plaintiff for a voyage from Boston to South America and back to Boston, at a stipulated compensation or hire per month. The charter-party was an absolute demise of the ship to the plaintiff for the voyage, and transferred the whole ownership of her *pro hac vice* to the charterer. The brig made her outward voyage and was despatched on a return voyage for New-York or Boston, but took on board a shipment of a stranger on freight consigned to a house in New-York, to which port she proceeded. Lander the charterer, failed in business, and became insolvent before the arrival of the brig at New-York; and on her arrival at that place, Woods the owner, entered upon her and insisted on holding the goods he found on board for the payment of his charter-money; or at least upon his right to the freight of those goods brought in her for the New-York house on freight. This freight was received by the defendant, who was master of the brig and who

thereupon delivered the goods; and this suit is brought for the recovery of the money so received.

On these facts two questions are made,—first whether the owner had a lien on the cargo of the chartered vessel, for his charter-money; and 2d, whether the deviation and departure of the ship from the voyage described in the charter-party, dissolved the contract and remitted the owner to his original rights.

The case is submitted by the parties on written arguments, the one side relying chiefly upon an opinion of a distinguished jurist\* of our own state and the other upon a judicial decision of the Supreme Court of a sister state. On the first point they concur in opinion; and it is perfectly clear from the terms of the charter-party, that the owner could have no lien on the goods shipped by the charterer, or under his authority on board the *Holly* for his freight. The entire vessel was let to hire by the owner to the charterer for the voyage, at a monthly rate of compensation and the distinction which runs through all the cases is, that where the possession and control of the ship are retained by the owner, and he covenants to carry the goods of the charterer in her for a stipulated freight, the lien for the freight remains. But where he transfers the ship to the charterer for the voyage, and the whole charge and control of her devolve upon the charterer, the owner can have no lien upon the cargo for the freight, but must have recourse to his covenant for his remedy in case of default of payment. Possession is essential to the existence of a lien. Here the plaintiff parted with his possession of the vessel, and he consequently, had no lien upon the cargo for his freight, but relied upon his covenant for his security.

The only material question is, whether the deviation or change of voyage dissolved the charter-party, or gave a right to the owner to re-possess himself of his vessel, and whether in either case he was remitted to his right as owner, and became entitled as such to retain the cargo as for freight. On this point the opinions laid before us disagree.

\* The defendant's counsel had presented to the court a written opinion of the late Chancellor Kent.

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On the part of the plaintiff, it is contended, that the voyage for which the vessel was let to charter, has been changed, and that the owner is thereby discharged from the obligation of the contract; and it is said, that as the freight was payable on the return of the vessel from the voyage, and could by the change of voyage never become due, the owner shall be remitted to his original remedy by lien on the goods for the price of the carriage. The cases cited in support of the proposition do not sustain it.

The case of *Cook v. Jennings*, [7th D. & E. 381.] was an action on a charter-party for freight covenanted to be paid on the arrival of the vessel at Liverpool, partly in money and the residue by a bill at four months. The ship was prevented from performing the voyage by perils at sea, and the cargo landed at a port of necessity, and accepted by the freighter. Held, that no action would lie on the charter-party, because the delivery of the goods at the port of discharge was a condition precedent which had not been complied with. But in that case, delivery was prevented by causes to which the charterer was not accessary, and not by the act of the charterer. In the same case, Lord KENYON, C. J., puts the case of a covenant by A to enfeoff B, (a stranger to the deed,) and states the law to be, as it clearly is, that A is not absolved from his covenant, though B will not accept livery of seisin, unless the act be frustrated by the *act of the covenantee*, thus taking the true distinction, that where the compliance with the condition precedent is prevented by the party himself who seeks to take advantage of the non-performance, it shall not avail him; and upon that distinction this case differs from those cited.

In the case of *Philips & Butler v. Rose*, [8 J. R. 392.] the action was covenant on articles of agreement, by which the plaintiffs agreed to erect a frame of certain dimensions on a certain lot, for an oil mill, on or before the 15th of June following; and the defendant agreed to make the press and other machinery, and to complete the same, the plaintiffs finding the materials, and boarding the workmen, and when completed, the plaintiffs were to procure and lay in 4000 bushels of flax-seed, which the defendant was to make into oil, &c.

The declaration recited the agreement, and averred performance, &c. on the part of the plaintiffs as to erecting the frame of the mill by the 15th of June, and alleged a breach on the part of the defendant. The evidence was, that the frame of the mill had been erected, but not until the 15th of September following the 11th of June; and that the defendant declared afterwards, that it was immaterial whether the frame was erected by the 15th of June or not; and that its not being finished by that time, was no damage to him, as he had not procured the workmen or the money. The evidence was objected to, but admitted. The mill was not erected on the spot, nor of the exact dimensions specified in the agreement, and parol evidence was also admitted, to show that the defendant had consented to the alterations, and assisted in fixing the spot, and directing the workmen in erecting the building, which was objected to as not supporting the declaration, but admitted. The defendant had performed no part of his agreement. A verdict was taken for the plaintiff, subject to the opinion of the court on a case.

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The court held, that the contract must be proved as it is laid, otherwise the defendant has no notice of what he is called upon to answer, and that evidence that the contract was enlarged by parol agreement, will not support the declaration.

In *Keating v. Price* [1 J. C. 22.] a special written agreement, whereby the defendant was to deliver to the plaintiff a quantity of staves, at a stipulated price, by a given day, viz: the 1st of May 1796. The defendant proved that the plaintiff in January 1797, admitted that he had agreed to extend the time for the delivery of the staves until the spring of 1797. A verdict was taken for the plaintiff subject to the opinion of the court, on the question whether the time for performing the contract could be extended by a subsequent agreement between the parties, and whether testimony could be received to prove the admission of the plaintiff of such enlargement of the time. The court declared themselves of opinion that being originally a simple contract, it was competent for the parties by parol agreement to enlarge the time of performing it, and that parol testimony to prove the plaintiff's declaration to that effect was admissible, an extension of the time

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being often essential to the performance of executory contracts, and there can be no reason why a subsequent agreement for that purpose should not be valid.

The question, however, did not arise here upon the form of the plaintiff's pleadings, nor upon the competency of the evidence to support the declaration. The plaintiff proved his case by showing the agreement, and the failure of performance by the stipulated day, and the defendant was put to his excuse of the non-performance for his defence; and to sustain that defence, he introduced the testimony to show the agreement to enlarge the time for performance, and the question for the court was the validity of such an agreement, and what its operation was upon the previous written agreement. If the party to the contract, who obtained the extension of time to perform, had brought his suit upon the original agreement, having averred performance by the day, and had on the trial shown a performance after the day, and an agreement of the other party to extend the time, the question would have arisen whether his proof supported his pleading, and then the principle afterwards settled in *Philips & Butler v. Rose*, would have applied.

In *Little v. Holland*, [3 Term R. 590.] the action was covenant on articles of agreement to build two houses on or before 1st April 1788; on the erection of which the defendant was to pay £500. The declaration stated that the houses were built and finished by the time, according to the agreement, but that the defendant had not paid. The defendant pleaded that the houses were not finished at the time limited by the contract; on which issue was taken. On the trial it appeared, that the work was not completed by the 1st April, but that the parties had by a parol agreement, subsequent to the date of the articles, enlarged the time, and that the whole work was completed before the expiration of that enlarged time.

It was contended that this was a substantial compliance with the contract, and a case was cited in which Justice BULLER was said to have ruled, that, where there had been an agreement to deliver a quantity of barley by a given day, and it was afterwards agreed, that the defendant should have a month longer to perform



the contract; the subsequent agreement was only a continuation of the first contract, a forbearance by the plaintiff for a longer time, and that a performance within the month would have been a substantial performance within the meaning of the first contract; and it was insisted that though that was *assumpsit* and this covenant, the principle was the same and ought to govern the case. It was admitted, that the subsequent agreement by parol, could not vary the terms of the contract; but it was contended, that it might be offered as evidence, that after the defendant's consent to enlarge the time, he was estopped from saying that it was not a substantial performance within the terms of the original contract. But KENYON Chief Justice said the point was so clear, he was not inclined to grant a rule to show cause. The declaration charged that the parties had stipulated by deed to perform a specific thing by a certain day; then if the plaintiff, who sues on the contract, be not bound to prove it as laid, the defendant has no notice of that, which he is called upon to answer.

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In *Roe dem. Gregson v. Harrison*, [2d T. R. 425.] a lease contained a proviso that the lessee should not let without leave in writing, on pain of forfeiture; and a parol license to let was held not to discharge the lessee from the restriction of such a proviso. And in *Brown v. Goodman*, [cited in a note to 3d T. R. 592.] which was debt on an arbitration bond, in which the time was limited for the arbitrator to make his award, the declaration stated, that the time was, by mutual consent of parties, enlarged; and that the arbitrator made his award within the enlarged time; but Lord KENYON held, that the defendant had bound himself to abide by an award under a penalty, if made within a given time: but that could never extend the penalty to an award, made after that time under a new agreement.

The principle of this last case was recognized and confirmed by the Supreme Court in the case of *Freeman v. Adams*, [9th John. R. 115.] It was there held, that an action would not in such case lie on the bond, but that the remedy of the party is upon the submission implied in the agreement to enlarge the time. And the court advert to the case of *Philips v. Rose*, [8th John. R. 392.] as

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an authority to show, that if a contract be subsequently changed, you must declare otherwise than on the contract itself. And they observe, that there is a wide difference between the case of a suit to enforce the bond or contract, in consequence of such agreement, and a plea of a discharge by the obligee, from a strict and literal compliance with the obligation, according to the doctrine in *Fleming v. Gilbert*. [3 John. R. 528.]

The same rule applies to charter-parties, and the strict compliance with a condition precedent, has, upon the same principle, been dispensed with where the party who objects to the action for want of such compliance, was himself the immediate cause of it. And in the case of *Hotham v. The East India Company*, [1 T. R. 638.] sanctioned by the court in *Smith v. Wilson*, the only thing that stood in the way of the plaintiff's recovering the allowance claimed for short tonnage, according to the terms of the charter-party, after having taken all proper steps on his part to obtain the necessary certificate to entitle him thereto, was the neglect and default of the company's own agent in refusing to afford him such certificate.

In that case, the court ruled, that assuming the clause relating to the certificate to be a condition precedent, yet the plaintiff's having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the company's agents, it was equal to performance. And the court emphatically add, that if it were necessary to cite any case for this, which is evident from common sense, it was so held in *Roll's Abridgement*, 445., and many other books.

In the case at bar, the charter was for a voyage from Boston to the east coast of South America, and back to Boston; where the vessel was to be discharged. And the covenant of the charterer is to pay for the use of her at the rate of \$600 per month, in thirty days after her return to Boston. She arrived at *Rio Grande*, a port in the east coast of South America, and was sent from thence by the agents of the charterer with a cargo to the port of New-York, with direction to the master, after discharging the cargo taken on freight for that port, to wait the orders of Lander, the charterer, as to the ulterior destination of the brig. Thus

the return of the vessel direct to Boston, which the terms of the charter-party are supposed to require, was rendered impracticable by the act of the charterer, whose agent sent her to the port of New-York. He therefore could not make it an objection to an action in this court for freight, that the return of the vessel to Boston was a condition precedent, which had not been performed. For it was an act which was to be done by himself, and his own breach of his implied covenant to return with the vessel direct to Boston, could not be set up or insisted upon by him as a defence against the action for the freight. If, then, it be admitted, that the neglect and default of the charterer in not returning with the vessel direct to Boston, was equivalent to performance, within the meaning and spirit of the cases, still the consequence could only be that, *eo instanti*, his wilful departure and deviation from the track of the voyage for which the brig was chartered to him, was consummated by conducting her to the port of New-York instead of Boston, he became liable to an action on his covenant for the monthly hire of the vessel, and the remedy of the owner against him was as complete as it would have been in case of her return to Boston.

The rule applied in cases of the capture of neutral vessels, rests on the same principle: for although the voyage is not completed, and consequently the whole freight not earned, yet as the captor has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and subject him to the payment of full freight. [*The Copenhagen*, 1 *Robinson's Admiralty, R. p. 289.*] If, then, the charterer breaks up the voyage, or substitutes a different port of destination from that authorized by the charter-party, whereby he prevents the completion of the voyage, for which freight, or a gross sum as compensation for her use, was to be paid, will not his change of voyage have the same effect as the actual performance of the voyage thus prevented, and the actual return of the vessel to the stipulated port, and subject him to the payment of full freight, or the entire sum contracted to be paid, for the use of the brig? And will not this immediate right to his reserved freight or compensa-

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tion for the vessel, and his right to her restoration, fully satisfy his just claims under the charter-party?

But take another view of the case. Was the brig bound by the charter-party to return direct to Boston, or had she not by fair construction a latitude to touch at intermediate ports in the *iter* of the voyage, so that Boston was constantly kept in view as the ultimate port of destination? The terms of the contract are, that she is to proceed to the east coast of South America and back to Boston, and on her return to that place to be delivered up; and the charterer is to pay for the use of the vessel a monthly compensation for each month she should be employed in the service, and not a gross sum for one entire voyage. There is no express covenant in the charter-party binding the charterer to return with her direct to Boston. And the provision for a monthly freight or compensation for the use of her during the time she should continue in the service, likens it more to a general contract upon time, allowing a latitude and range of employment, than a contract for a specific voyage to a designated port, and then directly back to the port of departure. And the subsequent agreements in the contract for the right of purchase and sale of the vessel at given periods on stipulated terms, strongly favours that construction. For it vested in the charterer a species of equitable ownership, and was calculated to impress on his agent the conviction, that he had a discretionary authority for her employment, and was at liberty so to order her return voyage, and to take such freight for the ports in the immediate route for Boston, as should best subserve his interest.

Malyne, in his *Lex Mercatoria*, states the case of a ship chartered by a merchant, who engaged the master and crew, equipped the vessel at his own cost, and by the charter-party engaged to pay the owner £20 for the use of her per month, until she should return into the Thames. The merchant loaded the ship for the straits, and to sail from port to port to different places; and after the expiration of two years she sailed from Barbary for London with a cargo, and was lost in a storm near Dover. The cargo was saved, but the merchant refused to pay the freight, because

the ship had not returned into the Thames. It does not appear whether there was any legal excuse on his part or not; but Malynes pronounces the merchant wrong, because the freight was designated by the month, and the place of ultimate return was only specified in order to ascertain the time when the freight would be payable. So in this case, the freight was designated by the month, and Boston, the place of ultimate destination, is specified to ascertain the time when the freight would be payable.

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But suppose the true construction of this charter-party to require that the brig should return direct to Boston. Did her touching at New-York to deliver the goods taken on freight for that port vacate and rescind the contract? Suppose the deviation to amount to a change of voyage, and conceding that it was the act of the charterer, could it absolve him from his covenant to pay the stipulated monthly rate of compensation? or would not the legal effect and operation of it, on the principles before stated, be to dispense with the return of the vessel to Boston, as a condition precedent to the right of action against him on the covenant for the charter money, and entitle the owner to an immediate action? But was the voyage on which the brig sailed a new or different voyage from that described in the charter-party? Or was her proceeding to New-York a deviation only from the voyage to Boston? The case states that she cleared for New-York and Boston: part of the goods were deliverable at New-York, and the residue at New-York or Boston, and the instructions of the master were to proceed to New-York, and there deliver the goods shipped for that place, and then wait the further instructions of the charterer.

Her clearance and the instructions both show that she was bound to Boston, after touching at New-York for the delivery of a part or the whole of her cargo, according to the instructions of the charterer. It was not at New-York, but at Boston, that the voyage was to end, and to which she was to return. The owner, by taking the possession and control of her at New-York, and divesting the charterer of all further power over her, prevented her return to Boston, and the fulfilment of the engagement to deliver her to him at that place.

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The charter-party did not require the brig to return to Boston with a cargo.

The only expressions in it, which intimate any such intention, are in the description of the voyage back to Boston, where she is to be discharged, and in the allowance of thirty days after her return to that port, for payment of the freight. But these provisions aptly apply to the case of her return with a cargo, which she had a right to do, and probably expected to do. But the Covenants, on the part of the charterer, for the payment of the charter-money, and the re-delivery of the vessel to the owner point to the return of the vessel and not to the discharge of the cargo. He stipulated to pay the hire of the vessel in thirty days after her return to Boston, and to deliver her to her owner on her return. She was on her way back to Boston, and but for the intervention of the owner, would, we are to presume have returned to that place. She was intercepted at the intermediate port, where she had touched, and was from that cause unable to complete and end the voyage. The orders to her master were not to terminate the voyage at New-York, but to wait there for the instructions of her charterer for the voyage. To what could these instructions refer? Clearly to the discharge of the residue of the cargo, which was shipped for the account of the charterer himself, and was to be delivered at New-York or Boston as he should direct. He might have directed the brig to proceed with that lading to Boston, and, even if his intentions were to direct her discharge at New-York, until his directions were given, her abandonment of the voyage was not complete. It continued a mere deviation from which the vessel might return or not, and as to which her election was not yet made and could not be known: Nor did it follow, that she would end the voyage at New-York, even if she discharged her whole cargo there. She might, and most probably would, if unmolested, have returned to Boston, either with part of her lading, or in ballast, and in either case she might have satisfied the terms of the charter-party. The owner had no interest in her returning to Boston with a cargo; for he would have no lien upon such cargo for his freight. He had

taken the personal covenant of the charterer for his security, and trusted to his solvency. The only ground he could have to complain, was the deferring the payment by postponing the time of the return, from which the credit of thirty days was to commence. But as an equivalent for that, the monthly payment of the hire would continue to run, up to the time of the arrival.

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In the actual state of things, which was produced partly by the act of the charterer in deviating from the direct voyage to Boston, and partly by the owner, in dispossessing the charterer of the vessel, and taking her into his own charge, it cannot be known with certainty whether the vessel would have proceeded on to Boston, or the voyage have terminated at New-York; and credence must therefore be given to the documentary evidence which shows an intention to proceed to Boston. If so, the vessel did sail on her voyage to Boston, but with the intention first to stop on her way, at New-York, and which intention she carried into effect. Was this, in the legal acceptance of the term, a change of voyage or a deviation from the original voyage? The criterion established by our courts for distinguishing between a change of voyage, and a deviation, is, whether the *termini* of the voyage are preserved or not. If the voyage, upon which a ship sails, have the *termini* of the voyage described in the contract, the identity of the voyage is preserved; and if she touches or trades at intermediate ports in the course or track of the voyage, she deviates only, but does not desert the voyage. In all the cases the question of deviation or change of voyage turns on that distinction.

In the case of *Henshaw v. The Marine Insurance Company*, [2 *Caines' R.* 274.] the principle was strikingly exemplified. That was the case of an insurance upon the vessel. The voyage described in the contract and for which the insurance was made, was at and from Newry, in Ireland, to New-York. Previous to her sailing, the master, in conjunction with the agent of the assured, entered into a written contract to land some passengers at Halifax in Nova Scotia under a penalty of £500. She cleared for New-York, but sailed on her voyage by way of Halifax. She there landed her passengers and afterwards arrived safely at New-

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York, the port of her ultimate destination. In an action on the policy for a loss, which happened before the vessel came to the dividing point, the court ruled, that the intention to touch at Halifax, did not make it a different voyage. The argument of the defendant was, that a settled plan and intention to alter the voyage destroys the contract; and that a voyage from Newry to Halifax, and then to New-York, could never be the same as a voyage from Newry direct to New-York. But the court held that the *termini* of the voyages being the same, neither the intention to touch at an intermediate port, nor the actual touching there, made them distinct voyages.

The same rule prevails in the English Courts. Thus where the captain, on a voyage from Honduras to London, took a consignment of goods for Amsterdam, it was held not to change the voyage. And in *Kewley v. Ryan*, [2 H. Bl. 343.] where the ship was bound from Grenada to Liverpool, but was to touch at Cork, the identity of the voyage was not destroyed by the deviation. And in the Supreme Court of the United States, in the case of the *Marine Insurance Company v. Tucker*, 3 Cranch's R. 375. where the voyage as described in the policy, was at and from Kingston in Jamaica to Alexandria in Virginia, and the vessel took freight for Baltimore as well as Alexandria, intending to touch at Baltimore first, and was captured while in the common track to both places, the court held, that as the final port of destination or *terminus ad quem* was not changed, the vessel had sailed on the voyage insured.

These cases all arose on policies of insurance, where the underwriter has no covenant of the assured to protect him, and must rely on a strict observance of the contract for his safeguard against abuse. And, if so much latitude is allowed to the assured in the construction of their contract with the insurers, the charterer ought not to be held to a stricter rule with the ship owner, to whom he is bound by personal covenant for his fidelity to his engagements, and is liable to damages for every deviation from them.

In § Lev. 41. we find the report of the case of *Cole v. Mallett*. It was an action of covenant on a charter-party, by which the



master of the ship covenanted to sail with the first fair wind to Barcelona, and that the mariners should attend with a boat to relade the ship, and then to return with the first fair wind to London, and unlade and deliver the cargo; and the freighter covenanted to pay freight and demurrage. The master brought his action for the freight and demurrage. The defendant pleaded, as to the freight, that the ship did not return direct to London, but went to Alicant and Tangier, and made divers deviations, and by those delays the goods were spoiled: to which the plaintiff demurred, and judgment for the plaintiff, for that the covenants are mutual and reciprocal, upon which each shall have his action against the other, but shall not plead the breach of one in bar of the other; for perhaps the damages of the one side and of the other are not equal. In that case, the master kept the government and controul of the ship, and covenanted to carry the goods of the merchant: consequently the deviation was his act. And it was surely as much a change of voyage as this. The deviation from the track of the voyage from Barcelona to London, in going to Alicant and Tangier, was quite as material as that to New-York, from the track of the voyage from South America to Boston. Yet the deviation was held not to dissolve the contract.

In this case, the vessel was let to the charterer, who took the exclusive possession and controul of her, appointed the master, and by his agents conducted the voyage, and received on board the freight for New-York. Then surely the breach by him of his implied covenant to return with the vessel direct to Boston, and there discharge, admitting it in its broadest latitude and fullest force, by taking freight for New-York, and proceeding to that port to deliver it, could not operate to vacate or dissolve the charter, or absolve him from his covenant to pay the freight, nor give the owner of the vessel a right to re-enter, dispossess the master of the vessel, and hold the goods of the general shippers for the payment of the freight secured by the bills of lading to him as owner.

It must often happen, that a freighter who charters a ship for a distant voyage, will meet with unforeseen occurrences, which prevent the strict and literal observance of all the conditions of the charter-party, and impose on him the necessity or expediency of

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deviation from the voyage prescribed by the contract, as the only means of avoiding a ruinous sacrifice. His deviation, if not fully and entirely justified by the exigency of the case, will expose him to damages for the breach of his covenant. But if he preserves the substantial features of the contract, and adheres, as far as reasonably practicable, to the general course and ultimate termination of the voyage prescribed to him, he cannot be said to forsake or abandon the charter-party.

In the case before us, the brig sailed from South America for Boston, by the usual and accustomed route, and the port of New-York, at which she was to touch, was in the course, and as it were, the very *iter* of her voyage. Can she then be said to have forsaken or wholly disregarded the charter-party? An advantageous and tempting freight offered for a port in the direct course of the voyage, and the immediate vicinity of the port of destination mentioned in the charter-party. The charterer, who by his controul of her, was the absolute owner of the ship for the voyage, and as the reward for the use of her was to pay a gross sum for each month she was employed in his service, agreed to take the freight for the intermediate voyage, but kept his eye steadily upon the port of destination to which he was bound by the charter to proceed. His voyage was for Boston, by way of New-York, and the latter port being in the course of the voyage to the former, that voyage was not abandoned or superseded, but was preserved, and intended to be performed; and if the deviation from it, by touching at New-York, was not warranted by the contract, it was a breach of the implied covenant to proceed direct to the contract port of destination; and the charterer would be liable to the owner for all the loss and damage which that deviation might occasion. But that breach of covenant could not dissolve the contract or vacate the charter-party. It would be a most alarming principle to establish, that every breach of the covenants of a charter-party by the charterer, should annul the contract, and give the owners a right to resume the ownership of the vessel, and dispossess the charterer.

Suppose the brig, in the case of the voyage from Newry to New-York, in the case cited from *Caines*, or the ship in the voyage from the West Indies to Alexandria, in the case cited from *Cranch*,

had been under charter for those voyages, and the master appointed by the charterers: could the owners have taken possession of the vessels at Halifax, or Norfolk, turned out the charterer, and his captain, and broken up the residue of the voyage? What was to become of the goods shipped in the one case for New-York, or in the other for Alexandria? The charterer was absolute owner for the voyage described in the charter-party, and had a right to contract with general freighters by bill of lading, to convey their goods in his vessel from the port of departure to the port of destination for freight. His charter-party was his title, and the shippers were bound to look no further for his right to contract with them. Could the contract be defeated by his subsequent deviation from the track of the voyage, to deliver goods subsequently taken on freight for others? Such deviation might give them claims to damages for any loss of insurance or other injury they might sustain by it, and it might also give a cause of action to the owners of the vessel; but it surely could not dissolve the charter-party.

But again. Could the owner, by possessing himself of the vessel against the will of the charterer, as for a breach of his own contract of hire, substitute himself for the charterer in his contract with the shippers, and enforce performance of them? The claim of the owner was to the gross monthly sum agreed to be paid for the hire of the vessel, and for that his remedy was against the charterer personally, and the charterer could not defeat that remedy by his own act in deserting the voyage prescribed by the contract, and substituting another in its place. What title, then, could the owner make to the freight payable by the shippers? The contract of the shippers was with the charterer as owner *pro hac vice*, and they have no privity with the general owner. If he assumes the possession of the ship, as forfeited by the deviation of the charterer, he must surely take it subject to the contracts of the charterer. His claim for his payment must still be against the party with whom he contracted, and the obligation of the shippers to the party who contracted with them.

Suppose the freight had been paid in advance, would they be compelled to pay it over again? Or if they had legal matter of

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set-off against the charterer, could their just rights be defeated? It cannot be contended that the shippers, who are strangers to the charter-party, and never contracted with the owner, can be bound or their goods liable for the whole monthly hire of the ship. And yet that is the amount which, by his contract, he was entitled to demand.

But the ship-owner's right to freight of the shippers' goods, is placed on the ground of lien. How was that lien acquired? He had no possession of the brig at the time the goods were shipped, nor until after her arrival at the port where the goods were deliverable. The freight, which then became payable, was due to the charterer. How could the right to that freight be transferred without his consent to another? The ship-owner regained the possession of the vessel by his entry; but it does not follow, that the immediate ownership and right of possession reverted to him, or became revested in him by his re-entry, or that the right to the freight payable by the general shipper to the charterer, or the lien for it upon the goods, was transferred or accrued by his entry and possession to him.

It has been my endeavour to show, that the personal covenant of the charterer contains the remedy of the ship-owner for the monthly sum or compensation stipulated by the charter-party for the use of the vessel, and that the further remedy he may have acquired for it, is an immediate right of action for the demand. And the views I have taken of the case, have resulted in the opinion, that the ship-owner, whatever his other rights in the premises may be, did not by his entry upon the charterer, and repossessing himself of the vessel, acquire or become entitled to a lien on the goods for freight, and that the plaintiff must have judgment.

OAKLEY J. The first ground on which the plaintiff's right of recovering is resisted, is, that Woods, as the general owner of the vessel, had a lien for the freight on the goods found on board, when he took possession, notwithstanding the provisions of the charter-party.

It is well settled, that the owner of a ship has, by the general rules of law, a lien on the cargo for his freight, although the vessel

may be hired to another, provided he continues in the actual, or constructive possession and control of it. His right of lien depends upon his possession. If that is parted with, the lien is lost. In *Clarkson v. Coles*, [4 Cowen, R. 470.] the Supreme Court lay down the rule to be, that when the general owner of a vessel parts with his ownership and possession, to a charterer, the latter is considered owner for the voyage, and the former has no lien for the freight. The court in that case, reviewed the principal cases on the subject, and they fully support the doctrine laid down. In *Chandler v. Talbot*, [18 John. R. 157.] Chief Justice SPENCER says, "the right to retain the cargo for the freight, has grown out of the usage of trade, and it does not exist where the parties have regulated the time and manner of paying freight, by stipulations in a charter-party; and especially if the cargo is deliverable before the arrival of the period of payment."

These principles, which are well settled, furnish the rule of determining the validity of the first ground of defence set up in this case. It cannot be doubted, that by the terms of the charter-party in question, the entire ownership and possession of the vessel for the voyage, were transferred to the plaintiff. He was to appoint the captain, who of course became *his* agent; and an express stipulation is inserted, that he should *deliver* the vessel to the owner on the termination of the voyage. These provisions in the charter-party are altogether inconsistent with the idea, that the owner retained any possession of the vessel, or had any control over her, during the continuance of the voyage. It is also provided, that the freight reserved in the charter-party, shall not be payable until thirty days after the termination of the voyage. There being no stipulation that the cargo should remain on board during that time, it follows, in the language of Chief Justice SPENCER, that the cargo "was deliverable before the arrival of the period of payment," of the freight.

The present case, as far as the first ground of objection to the plaintiff's recovery is concerned, falls entirely within the principles of *Clarkson v. Coles*, and *Chandler v. Talbot*.

The second ground upon which the plaintiff's right of recovery is resisted, is, that the vessel having touched at New-York, without

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necessity, on her return voyage, and having thus departed from her direct route, the charter-party was thereby violated by the plaintiff; and that Woods, the general owner of the brig, had a right to consider it as abandoned, and to resume the possession of the vessel; and that having thus regained the possession, his right of lien for freight attached upon the goods found on board.

When the goods shipped at Rio Grande, and consigned to Whitlock, at New-York, were put on board, it is clear that the contract for the payment of the freight was made by the shipper with the plaintiff. The plaintiff being owner of the vessel *pro hac vice*, had a right to take the goods on freight; and the shipper having contracted to pay the freight to him, was bound to do so, on the delivery of the goods to the consignee, at New-York; unless he was discharged from that obligation by the alleged violation of the charter-party by the plaintiff. I am at a loss to conceive how any such violation, if it took place, could authorize the shipper or his consignee to refuse to pay the freight, when it had been earned according to the terms of his agreement with the owner of the vessel.

It seems clear, that on the arrival of the vessel at New-York, the obligation to pay the freight to the plaintiff became complete on the part of the shipper, or his consignee: and if so, it is equally certain that he could be under no obligation to pay it to the general owner of the vessel. The freight might have been paid in advance to the plaintiff; or the payment might have been postponed by agreement to a day subsequent to the delivery of the goods; in either of which cases, it could not be pretended that the general owner of the vessel could have retained the goods, though the charter-party may have been abandoned, or annulled with the consent of the plaintiff. The terms of the agreement between the plaintiff and the shipper of the goods, could not have been affected by the interference of any claims, on the part of the general owner. And the true ground, as it appears to me, on which the decision of the case ought to rest is, that as between the shipper, or his consignee and the plaintiff, the right of the latter to claim the freight, could not be questioned by the former; and that the consignee could not have paid it to Woods, the general owner, ex-

cept in his own wrong. The payment to the defendant, who was the agent of the plaintiff in taking the goods on board, and in earning the freight, by the completion of the voyage, was equivalent to a payment to the plaintiff; and the money must be considered as paid for the plaintiff's use, because it was paid in discharge of the contract made with him, by the shipper of the goods.

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The case would stand thus, in my judgment, though it were conceded that Woods had strictly a legal right to take possession of the vessel, on her arrival at New-York. But had he such right? The position is, that by a departure from the direct route of the voyage from Rio Grande to Boston, and touching at New-York, although with the intent to terminate the voyage at the latter place, the general owner of the vessel was authorized to dissolve the charter-party, to resume the possession of the vessel, and to demand payment of the freight of any goods he might find on board; not in pursuance of the terms of the charter-party, but as upon a *quantum meruit*. These are consequences which can scarcely flow from so unimportant a deviation from the direct line of the voyage.

The charter-party clearly continued binding on the plaintiff, though the vessel touched at New-York, and would continue to operate until her arrival at Boston, unless the interference of the general owner, and the consequent breaking up of the voyage, discharged him from it. The owner, then, lost no security for his freight, in consequence of the touching of the vessel at New-York. He relied originally on the personal responsibility of the plaintiff, and assumed the hazard of his becoming insolvent. He has no ground of complaint, unless it be that the voyage might have been somewhat lengthened, and the period at which the payment of freight, according to the terms of the charter-party, was to become due, might have been postponed for a few days. This consideration is of little importance, when it is recollected, that the freight is charged at a certain sum per month, during the continuance of the voyage: and that the voyage itself was therefore understood by the parties to be one of indefinite length. And indeed, the provision in the charter-party, that the voyage is to

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terminate at Boston, may justly be considered as inserted, rather for the purpose of fixing a period, from which the time limited for the payment of the freight may begin to run, than to confine the homeward voyage to the most direct route from Rio Grande to that place. If the deviation from the direct route of the homeward voyage can be considered at all as a violation by the plaintiff of the terms of the charter-party, the owner of the vessel may, probably, have his action for the damages, if any, which he may have sustained in consequence of it. But I know of no principle upon which the owner, under such circumstances, is justified in treating the charter-party as a nullity.

The preceding view of this case agrees with that taken by the S. C. of Massachusetts, in the case of *Pickman v. Woods*, in which the same questions were involved, arising under the same charter-party. We have been furnished with a manuscript copy of the opinion delivered by C. J. PARKER, in giving the judgment of the court in that case. It was an action of replevin for certain property, the proceeds of the cargo, shipped by Lander under the charter-party in question. The cargo was assigned by *Lander* to *Pickman*; and on the arrival of the vessel at New-York, *Pickman* claimed the property under his assignment, which *Woods* refused to deliver, unless the freight was paid. The same questions existed as in the present case. 1st. Whether *Woods* had a lien on the goods for the hire of the vessel, by virtue of the charter-party. 2d. If not, whether, in consequence of the vessel's going to New-York, the charter-party ceased to be binding on *Woods*, so that he might resume the possession of the vessel, and acquire a right to freight on such goods as he found on board. Both these questions are examined at length by the Chief Justice; and he comes to the conclusion, that *Woods*, by the fair construction of the charter-party, had transferred the entire possession and control of the vessel to Lander, and could not claim a lien for the freight upon any goods taken on board by him; and that the vessel's touching at New-York, under the circumstances, did not authorize *Woods* to consider the charter-party as dissolved; and judgment was given for *Pickman*.



This is an adjudication of a court of high authority on the very points involved in the present case, and is entitled to great respect. I am entirely satisfied with the correctness of the decision, and with the reasoning on which it is founded.

The defendant, then, in the present case, having received the freight in question from the consignee of the goods, is to be held to have received it for the use of the plaintiff; and having paid it over with full knowledge of the plaintiff's rights, he is liable to the present action. The plaintiff must have judgment for the amount of the freight, with interest, according to the stipulations of the case.

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*Judgment for the plaintiff.*

[R. M. Blatchford, *Att'y for the plff.* H. & E. Wilkes, *Att'ys for the def't.*]

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A party giving a bill of particulars under a Judge's order, is not held thereby to furnish evidence against himself; but is merely confined at the trial to the range of proof which he himself has chosen. And where referees allowed the plaintiff to resort to the particulars of the defendant's set-off, to establish a fact, the evidence was held to have been improperly admitted.

Where referees certify to the court, that they have overlooked a circumstance connected with the accounts submitted, and request that the same may be sent back to them for re-examination, the court will set aside the award and send back the accounts to the same referees.

*Mr. J. Stevens* in behalf of the defendant in this cause, moved to set aside a report of referees, to whom the accounts of the parties had been submitted under a rule of court.

He read an affidavit setting forth, that in the progress of the investigation of the accounts before the referees, the counsel for the plaintiff read in evidence *a bill of the particulars of the defendant's set-off*, which had been served upon the plaintiff's attorney, pursuant to a rule obtained in the ordinary way, under a Judge's order,

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for the purpose of proving the payment of a sum of money at a particular time. The counsel for the defendant objected to the reading of the bill of particulars for the object stated; but it was admitted and received by the referees as evidence.

A certificate signed by the referees was also read by Mr. Stevens, stating a request on their part that the accounts, might be again sent back to them for examination, upon the ground that "a circumstance connected with the accounts had been overlooked by them in making their report."

The counsel for the defendant contended,

I. That the referees ought not to have admitted the bill of particulars, as evidence against the defendant.

II. That the mistake of the referees as proved by their certificate is sufficient to send the accounts to new referees on the merits. [*He cited 2 Esp. N. P. C. 602. 2 J. R. 62.*]

Mr. T. C. Pinckney for the plaintiff contended,

I. That a party is bound to confine himself to his bill of particulars. [14. J. R. 329. 15. J. R. 222. 2 Bos. & Pul. 243.]

The case cited from *Espinasse*, was an action for the sale of some lottery tickets, and the particulars of the defendant's set-off were produced as *proof of the sale*. But here the bill of particulars was offered for the sole purpose of establishing the time at which a certain payment was made. It was not used to prove the account, or support the declaration, or to show admissions in favour of the plaintiff. For the purpose of identifying the time of a payment the particulars of set-off were admissible in evidence. [1 *Phil. Ev.* 153-4., and the cases there cited.]

II The certificate of the referees ought not to be received by the court: 1. because it is not under oath: 2. because "the circumstance connected with the accounts" which is said to have been overlooked, is not stated in the certificate. And thirdly, be-

cause parties are never permitted to introduce the certificates or affidavits of arbitrators, referees, or jurors to show a mistake. [6 Cowen's R. 53. 2 John. R. 92. 2 Arch. P. 225., & 292.]

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*Per Curiam.* The report of the referees in this case must be set aside, and the accounts referred back to them for re-consideration. The bill of the particulars of the defendant's set-off, was not proper testimony to prove any fact; and is not to be viewed in the light of an admission. Its sole object is to point out and specify the party's claims, and to restrict him at the trial to the range of proof which he has himself chosen, so that the opposite party may be apprized of the charges which may be proved. A party giving a bill of particulars under a Judge's order, is never held thereby to furnish evidence against himself; and it is in practice considered as a part of the pleadings.

The second ground assumed by the counsel of the defendant against the report is also well taken. It appears from a certificate furnished by the referees that a circumstance connected with the accounts was overlooked by them on their examination. What that circumstance was, we are not informed; but the court have a right to deem it an important one, since the referees themselves request that the accounts may be sent back to them for re-consideration. The affidavits of jurors cannot be received to show a mistake upon the grounds of public policy; because they may be tampered with. But the rule does not extend to referees. True it is, *this* certificate is not under oath; but that will not vary the case. If the court be satisfied that a mistake has been made by the referees, and that substantial justice requires it to be rectified, they have the power to set aside an award and direct a re-examination of the accounts. In this case, the referees themselves have declared that the matters laid before them ought to be re-considered; and we therefore direct the report to be set aside, and that the accounts be again submitted to the same referees for re-examination.

[T. C. Pinckney, *Att'y for the plff.* T. Stevens, *Att'y for the def't.*]

Dec. Term,  
1828.

Denn, ex dem  
Hughes

v.  
Morrell and  
others.

JOHN DENN, EX DEM, LUCRETIA HUGHES

versus

WILLIAM M. MORRELL AND OTHERS.

Upon an application for a new trial, on the ground of newly discovered evidence, where such evidence rests in the knowledge of a witness, the Court will require the party moving to produce an affidavit of the witness, setting forth the facts upon which he relies, or to show that it could not be obtained.

THIS was an application for a new trial, upon the ground of newly discovered evidence. The original action brought by the plaintiffs, was an action of ejectment, to recover one third part of a house and lot of land, situated in the city of New-York. Upon the trial, the plaintiffs had a verdict, subject to the opinion of the court, upon a case to be made, and upon the argument of the case, the court gave judgment in favour of the plaintiffs. The defendants now moved for a new trial upon the ground of newly discovered evidence. The affidavit upon which the motion was founded, was made by John M. Cannon, one of the defendants, and it set forth the *particular facts*, which the defendants expected to prove, if a new trial were granted. It stated also, that a fortnight after the trial of the cause, the deponent "discovered new" and material evidence in favour of the defendants;" and further, that upon a new trial, the deponent would be able to prove the facts upon which relied by Frederick Dibblee, Esq., of the city of New-York, counsellor at law. It was also stated by the deponent, that the witness would testify, that the lessor of the plaintiff had, at a certain period long since elapsed, executed a deed in his presence, either a quit claim or a release, (the witness could not remember which,) whereby all the interest of the lessor in the premises was conveyed to one Maria H. Williamson. That said deed was delivered in the presence of Dibblee, but had never been in the possession of the deponent, and as he was informed, and verily believed, it had never been in the possession of

the other defendants, but had been lost or mislaid in the life-time of the said Maria.

Dec. Term,  
1838.

Denn, ex dem  
Hughes  
v.  
Morrell and  
others.

It was objected to this application,

I. That the affidavit did not contain any allegation of the deponent's ignorance of the fact, that Dibblee could testify to the matters detailed until after the trial.

II. That there was no affidavit of Dibblee.

III. That there was no affidavit of the other defendants as to the loss of the deed. And [3 *Caines' R.* 186. and 8 *J. R.* 489.] were cited.

Upon this state of facts, the Court *held*, that the party moving for a new trial upon the ground of newly discovered evidence, was bound to produce the *affidavit of the witness*, from whom such evidence was to come, setting forth the facts, or shew that such affidavit could not be obtained. In the present case, (they said,) there was no ground to suppose that Dibblee would give the testimony detailed in the affidavit, except from the *belief* of the deponent, and the application was therefore refused.

{W. W. McLellan, *Att'y for the plff.* John M. Cannon, *Att'y for the def.*}

Dec. Term,  
1898.

Norton  
v.  
Vultee.

JAMES C. NORTON AND JOHN L. NORTON

versus

GERTRUDE VULTEE.

An action of *debt*, for the recovery of rent founded on a lease, will lie in favour of the lessor, notwithstanding the lease may have *expired*.

The *assignee* of a lease, who enters upon and occupies the demised premises, is liable for the rent in like manner with the assignor. In declaring against him, he may be described as assignee in general terms; and the *manner* in which the assignment was made, need not be set forth. But the assignee cannot be made answerable, by the action of *debt*, for the rent of any part of the premises demised, except that which has been possessed and enjoyed by himself; and the rent in such cases may be *apportioned*, the action being founded on the *privity of estate* merely, and not on the privity of contract.

The plaintiffs demised certain premises for a term of years to one F. L. Vultee.

The lessee, a short time before the expiration of the term, died, and the defendant, (his widow,) took out letters of administration upon his estate, and continued in possession of a part of the premises, until the lease expired. An action of *debt* being brought against her for all the rent which was in arrear at the time of the expiration of the lease, it was **HELD**, that she was only liable in this action for the rent of such parts of the premises as had been occupied by her after her husband's death.

THIS was an action of debt, brought against the defendant as the assignee of a lease. The declaration was founded on an indenture of lease, made by the plaintiffs to one Frederick L. Vultee, bearing date the 20th of February, 1821, for the term of five years, to commence on the first day of May thereafter, and reserving rent at the rate of \$160 per annum, payable quarterly. The declaration stated, that after the making of the lease, to wit, on the first day of April, 1825, "all the estate, right, title, interest, and term of years then to come, of the said Frederick L. Vultee, in and to the said demised premises, *by assignment thereof*, came to and vested in the defendant; whereupon she entered upon said premises, became thereof possessed, and so continued from thence until the first day of May, when said lease was determined." The declaration further stated, "that after the making of said indenture, a large sum of money was in ar-

"rear, to wit, the sum of eighty dollars for the two last quarters, ending the first day of May, 1826;" for which sum this action was brought.

Dec. Term,  
1828.

Norton  
v.  
Vultee.

The defendant pleaded *nil debet*.

The cause was tried before MR. JUSTICE HOFFMAN on the 9th day of September 1828. At the trial the plaintiffs proved the execution of the lease, and that one Michael Jordan hired the front part of the premises described therein for the term of three years, and paid the rent *in advance* to Frederick L. Vultee. After the death of Jordan, one McGlade purchased of Vultee the residue of his term of the front house, and paid him therefor in advance. The defendant occupied the rear house on the premises, but never occupied any part of the front, which was hired by McGlade.

The plaintiffs also proved, that on the 24th of February 1825, letters of administration were granted to Gertrude Von Vultee, widow of Frederick Louis Von Vultee, by the surrogate of the city and county of New-York.

Upon this evidence the counsel for the plaintiffs having rested their cause, the counsel for the defendant moved for a non-suit upon the following grounds. First, that the letters of administration did not show the defendant to be the person declared against.

II. That the action of *debt* would not lie, on an expired lease.

III. That the declaration did not state *how* the defendant became liable as assignee.

IV. By the plaintiffs own showing a part only of the premises came to the defendant; the recovery against her, therefore, could only be for the part she occupied.

Upon these objections the presiding Judge declined passing an opinion at the trial, but directed the jury, with the consent of parties, to find a verdict in favour of the plaintiffs for the two quarters rent and interest, subject to the opinion of the court upon the whole case.

Dec. Term,  
1838.

Norton  
v.  
Vultec.

The jury returned a verdict in favour of the plaintiff for ninety three dollars and eighty cents.

A case having been made containing the foregoing facts. *Mr. Mulock* for the defendant now contended, that the plaintiffs should be non-suited for the reasons assigned at the trial. That *this* action would not lie on an *expired* lease. The action of debt (he said) grows out of the *privity between the parties*, and when that expires, the right to the action expires with it. There never was any privity of *contract* between the plaintiffs and the defendant in point of fact, and the lease terminated on the first day of May. No action would lie against the defendant *on the lease*, for she never was a party to it, in any shape, directly or indirectly. [*Woodfall* 326. *Cro. Eliz.* 264. 2 *East's R.* 575.]

II. It does not appear from the pleadings *how* the defendant became assignee. As she is sued in a special character, she should have been specially declared against: she is *charged* as administratrix, but is not *sued* as such. By this means, the defendant is taken by surprise, for if she had been sued as administratrix, she might have pleaded *plene administravit*. As assignee *in fact*, the defendant had no notice, and the object is to charge her as assignee in judgment of law. But conclusions of law are not to be pleaded; the facts from which those conclusions are drawn are to be set forth, that the defendant may know how to answer. In this case the letters of administration could not prove the defendant to be assignee in fact, and the plaintiffs was bound to show *the manner* in which she became liable to him for the debt, which they seek to recover. [1 *Saund.* 104.] It will probably be said, that if an executor or administrator cannot get rid of a term, that all the legal consequences of the contract, attach themselves to him. If this be so, then clearly the declaration ought to point out the character in which the defendant is sued. [*Cro. Jac.* 549. 1 *Mod. R.* 188.]

III. The proof does not support the declaration. The only evidence adduced to charge the defendant, is to be found in the letters of administration granted to *Gertrude Von Vultec*. The



name of the administratrix is entirely different from that of the defendant, and there is no proof that the same person is meant. This is a fatal variance. [1 *Comp. R.* 195. 2 *Esp. R.* 726. 2 *Barn. & Ald.* 756. 4 *Maul. & Sel.* 470.]

Dec. Term,  
1836.

Norton  
v.  
Vultee.

IV. The recovery in this case, at all events, can only be *pro rata*, for the plaintiffs show, that no part of the premises except the rear building ever came into the possession of the defendant. As she is not charged by privity of *contract*, but only by means of the privity of *estate*, she can only be made answerable for the rent of that portion of the premises which came to her.

A personal *contract* cannot be apportioned; but if the lessee for years rendering rent, grant away part of the land during the terms, the rent shall be apportioned. [*Shep. Abr.* vol. 1. p. 166.]

The plaintiffs of course must have accepted McGlade as a tenant, because the defendant is merely charged as assignee. If so, she is the assignee of that part of the premises only, which came to her, and McGlade was the assignee of the residue. The defendant ought not to be made liable for an estate, which she never enjoyed, and cannot be made liable as the representative of her deceased husband, unless charged as such. [2 *East's R.* 575. 14 *John. B.* 89. *Woodfall* 280. 2 *Lev.* 231. 3 *Coke* 32. *Lilly's Entr.* 133.]

*Mr. Selden contra* for the plaintiffs.

The plaintiffs in this case demised certain premises, for a term of years, to one Frederick L. Vultee. The lessee before the expiration of the term dies, and the defendant his widow, takes out letters of administration upon his estate, and continues in possession of the premises. The rent for two quarters, having become due, and remaining unpaid, this action of debt is brought against the *administratrix*, to recover that amount.

The plaintiffs have their option to resort to an action of covenant, or debt, for either of them will lie in a case like the present, although debt is the most appropriate remedy. [1 *Saund.* 233. a. 1. *Woodfall*, 323. chap. 13. sec. 2. 1 *Lev.* 25.]

Dec. Term,  
1828.

Norton  
v.  
Vultee.

The counsel for the defendant has been misled by the marginal note to the case in *Cro. Eliz.* 264. ; for upon an examination of the text there, it will be found that the lease in that case had been *cancelled*, and that was the reason why debt would not lie. But the case in 1 *Lev.* 25. was an action of debt on an expired lease, and is directly in point for the plaintiffs.

II. As there can be no doubt about the propriety of this action, the next question arises upon the state of the pleadings. It was not necessary or practicable for the plaintiffs to set forth the *terms* of the assignment from the lessee to the defendant. How could *they* know any thing of a new contract between other parties? and how can they be compelled to set forth that which cannot be within their knowledge? The lessor has his election to charge the defendant, either as administratrix, or as assignee. She may plead in her defence that she is administratrix, and that the premises do not produce the amount claimed by the landlord, and that she has no assets to make good the deficiency. But where a privity of estate for any part of the premises exists, the plaintiff may bring his action for the whole rent, and the defendant must show the reason why he is not chargeable for the whole. The intermediate transactions between the lessee and his assignees, cannot be known to the lessor, and if there be any *spécial* defence against the claim of the landlord for the whole rent, the defendant should show that by his plea. [1 *Chit. Plea.* 353. 2 *Ib.* 194. *note.* 1 *Saund.* 1. *note* 1. 1 *Salk.* 316. *Cro. Jac.* 411. *Cro. Eliz.* 633. 1 *Salk.* 308. 297. *Cowp.* 768. *Doug.* 184.]

III. The only inquiry remaining is, whether the proof supports the declaration. The variance at most, is merely in the middle letter of the defendant's name, which is never considered as a defect. But if the defendant intended to rely upon this as her defence, she should have pleaded the matter in abatement. The person of the defendant is identified in the letters of administration as the widow of Frederick Louis Vultee, and if she be not the person meant, let that be shown by a proper plea. This

is no defect or variance in point of fact, and if it were, it could not be taken advantage of in this manner.

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1838.

Norton  
v.  
Vulsee.

*Per Curiam.* This is an action of debt brought against the defendant as the assignee of a lease, to recover rent in arrear. From the facts disclosed by the case, and from the averments in the declaration, it may be fairly inferred, that the rent for which the action is brought, has accrued since the death of the original lessee; that the defendant has since that time entered upon and enjoyed a part of the demised premises, and that the lease on which the action is founded, expired before the commencement of this suit.

The first objection made to the plaintiff's right of recovery is, that the action of debt will not lie on an expired lease. But this is a mistake. At common law the lease *must* expire before an action can be brought, and then *debt* is the proper action. We have looked into the case cited by the defendant's counsel from [*Cro Eliz. p. 264.*] and are satisfied that its import has been mistaken. The termination of the lease can neither destroy the lessor's right to the rent, nor take away his remedy to recover it. And there is a case reported in the same book, (*Brown v. Hare, Cro. Eliz. 633.*) where it was expressly decided, that debt upon an expired lease would lie, and the other authorities cited on the argument fully support the same position. [1 *Lev. 25.* 1 *Saund. 233. a. 1.* *Woodfall, 323.* 2 *Lev. 231.*]

The objection that the declaration does not show the *manner* in which the defendant became assignee, is equally unfounded. She may be described as assignee in general terms, and such description will be sufficient to charge her for the estate which actually came into her possession; "for the plaintiff is a stranger to the defendants' title, and cannot set it out particularly." [1 *Chit. 353.* *Folliard v. Wallace, 2 John. R. 402.* 1 *Saund. note 1.* 1 *Salk. 316.*]

But the verdict in this case has been rendered for the entire rent of the whole premises for the two quarters, which is a greater amount than that for which the defendant is liable; and there must, therefore, be a new trial, to correct the amount of the recovery. The defendant entered upon a *part* of the premises only,

Dec. Term,  
1838.

Norton  
v.  
Vultee.



and she cannot be charged for a greater estate than that which she enjoyed. She is sued as assignee generally, and like every other assignee, is liable for the estate which came into her hands. In all cases where there is no privity of contract, the rent may be apportioned, and the law leans towards this course, as most consistent with the ends of justice.

If the defendant had been sued as administratrix with assets, then the rent could not have been apportioned, for the administratrix would have been bound to fulfil the contract of the intestate. But here she is made answerable for the estate which she has *herself enjoyed*, and the judgment goes against her own property. As she is liable merely through her privity of estate, she of course cannot be made answerable for what she never possessed.

There must therefore be a new trial, to ascertain what the value of the rent of that portion of the premises occupied by the defendant, actually was, in relation to the other part in the possession of McGlade, the other tenant.

As in the view we take of the subject, the defendant is liable, in her own capacity, for the rent of the premises enjoyed by her, the objection, that the proof does not support the declaration, in consequence of a misdescription in the defendant's name, has no application, and need not be considered.

*New trial granted.*

[Emmet and Selden, *Att'ys* for the *plffs*. Muloch, *Att'g* for the *def't*.]

Feb. Term,  
1888.

HANNAH ROGERS ET AL. EXECUTORS OF FITCH ROGERS DECEASED,  
*versus*  
 NEHEMIAH ROGERS.

Rogers et al.  
 v.  
 Rogers.

A court of law cannot take jurisdiction of accounts between partners. To an action upon a promissory note, the defendant pleaded that the note was given as the consideration of a release of a certain lot of land held by himself and his co-partner *jointly*, upon the supposition that the balance of the partnership accounts was in favour of such co-partner; whereas in point of fact, the balance was in his own favour, and so, that the consideration had failed. The plaintiff replied that the balance of said accounts was not in favour of the defendant, and and that the said lot of land was held by the said co-partners not jointly, but as tenants in common. Upon demurrer to this replication it was held that the *plea* was no bar to the action, as it sought to cause an investigation of accounts between partners, before a court of law. The *plaintiffs* therefore, had judgment on the demurrer.

THE declaration in this case contained two counts. The first was upon a promissory note for \$1457. 74., bearing date the first day of May 1827., made by the firm of N. Rogers and Son, in favour of the defendant, payable twelve months after date at the Bank of New-York, and *endorsed* by the defendant to the *testator* of the plaintiffs. The declaration alleged a regular demand at the Bank of New-York, when the note became payable, and a refusal of payment on the part of the makers with notice to the defendant.

The second count, was for money lent and advanced, money paid, money had and received and upon account as stated.

The defendant pleaded first, non-assumpsit, and secondly in bar of the action, that the consideration of the notes specified in the declaration and *the bill of particulars* of the plaintiffs, "was the release by said testator of his supposed right and interest in certain real estate situate in Pearl-street, (No. 232.) in the city of New-York, wherein the defendant and the said testator were jointly and exclusively interested as co-partners under the firm of Rogers & Lambert, and said makers of said notes above declared on and mentioned in said bill of particulars, had not any interest therein; and under an impression that said co-partnership in form, (but the defendant in fact,) was indebted to said

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1899.

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v.  
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"testator on co-partnership account; a release of his said supposed  
"interest in said real estate was executed and said notes were given  
"therefor, whereas in fact and truth, since the giving of said  
"notes, viz: within a short time before the institution of this suit,  
"it was discovered that the balance of account between the de-  
"fendant and said testator, in said partnership account is against  
"said testator in a large amount, and was in fact, against said  
"testator at the time of the giving of said note:" and the defend-  
"ant averred, "that said testator had not any right or interest in  
"said real estate to release," &c.

To this plea the plaintiffs replied by protesting, that the balance of account between the defendant and said testator in their co-partnership accounts was not against the said testator at the time of the giving of said note, and by alleging "that said testator and  
"the said defendant were not jointly interested in the said real  
"estate as co-partners under the firm of Rogers & Lambert, as in  
"the said plea is alleged, but as tenants in common, and that the  
"said testator had a right or interest in said real estate as such  
"tenant in common to release," and of this he put himself on the country.

To this replication, the defendant demurred specially; first, because the plaintiffs, by their replication, admit that the balance of account mentioned or referred to, was against the said testator, and yet deny that said real estate was co-partnership property. Secondly, because the replication is double. Thirdly, because the balance of account being against the said testator, the real estate was thereby co-partnership property. Fourthly, because the plaintiffs have not set out with sufficient certainty the title and interest which they aver their testator had and released; whereas they ought to have averred that their testator was seized in fee, (and undivided with said Nehemiah) of a certain specific portion of said real estate, and being so seized thereof, released the same to the makers or endorsers of said notes, as the case might be. In support of the cause, last assigned,

Mr. G. Sullivan, for the defendant, cited [*Coles v. Coles*, 15 J. R. 159. 1 *Marsh. R.* 258. *Maberley v. Robins*, 5 *Taunt.* 625. *Johnson v. Johnson*. 3d *Bos. and Pul.* 162. *Sugden on Vend.* 226.]

He also insisted, that the causes of demurrer were well taken, and that the plea was not answered.

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1838.

Rogers et al.  
v.  
Rogers.

*Mr. Sedgwick*, for the plaintiffs, *contra*, contended, that the plea was bad :

I. Because it assumes to answer the whole declaration, whereas it answers only the count on the note. [1 *Chit. P.* 509. 18 *J. R.* 28.]

II. The bill of particulars makes no part of the record, and the court cannot know on demurrer what it comprises.

III. The plea is founded on partnership accounts and other matters, of which a Court of Equity alone has cognizance.

IV. The plea is argumentative.

*Mr. Sedgwick* insisted principally upon his third point, and that matters of partnership between the parties could not be investigated in a trial at law.

The court decided the demurrer in favour of the plaintiff on the argument, upon the ground that the matters set up in the plea, if they could furnish any defence, were not available as a bar to the action in a court of law.

*Per Curiam.* If the defendant relies upon partnership transactions as a defence to an action at law, his course obviously is to go into a Court of Equity, which alone has the power to investigate accounts between partners, and to do justice between them. This suit might be restrained by an injunction out of Chancery upon a bill which the defendant has the power of filing. If he wishes to have an investigation of the accounts between himself and his deceased partner, he has merely to apply to the tribunal which has jurisdiction over the subject matter to be examined. But how can this court ascertain in an action at law, upon which side lies the balance of the accounts? Are they to be investigated by a jury at the trial, and can they examine the transactions of

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1839.

Rogers et al.  
v.  
Rogers.

years perhaps, and measure out justice in an intelligent and impartial manner, upon matters which may require an appeal to the consciences of the parties, as well as to the ordinary proofs furnished in a trial at law? It is obvious that the defendant has mistaken the proper mode of defending himself and has sought to investigate matters before a tribunal which cannot take proper cognizance of them. His plea, therefore, cannot be sustained, and as the first fault inpleading is his, the plaintiffs must have judgment upon the de-murrer.

*Judgment for the plaintiffs on the demurrer.*

[D. D. Field, *Att'y for the plffs.* A. G. Rogers, *Att'y for the defl.*]

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HANNAH ROGERS AND OTHERS, EXECUTORS OF FITCH ROGERS  
DECEASED,  
*versus*  
NEHEMIAH ROGERS AND SAMUEL ROGERS.

A Court of Equity has exclusive jurisdiction of accounts between partners, and a plea in bar of an action upon a promissory note, which sought to open partnership accounts for the purpose of showing, that there was a *mistake* in the note and that its consideration had failed, was adjudged to be bad upon demurrer.

The declaration in this case, contained two counts. The first count was upon a promissory note for \$8,000, made by the defendants in favour of Fitch Rogers deceased, of whose last will and testament the plaintiffs were executors. The note was dated on the 31st of December, 1814, and was payable two years after its date with interest.

The second count was for money lent, money had and received, money paid and upon an account stated.



The defendants separately appeared by the same attorney and separately pleaded the same pleas in bar of the action. These pleas, (especially the second) were long and special in their statements alleging all the matters therein contained in a very circumstantial and particular manner.

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1829.

Rogers et al.  
v.  
Rogers.

The first plea set forth in substance, "that before the making of the note in the plaintiff's declaration mentioned and *the bill of particulars* above set forth and stated," the said Nehemiah and the said testator became co-partners with one David Rogers Lambert, under the firm of Rogers and Lambert, to wit in the year 1795. That the books of the firm were kept by Lambert who was to be rewarded by a part of the profits of the business, while all the capital should remain the property of the testator and Nehemiah Rogers.

That in the year 1811, Lambert being debtor to the firm in the sum of £4768,7,4 : New-York currency, in stating his account with the firm debited to them the sum of £3,500. *as profits* and admitted a balance of £1,268. to be due from himself to the firm : which sums he afterwards entered in the partnership books whereby he stood discharged of said last mentioned sum and the said testator had credit for \$1,610,45. This last entry was made, as if Lambert had actually paid the money to the firm, whereas in point of fact no part of it was ever paid into the partnership funds : nevertheless the said testator had credit for it and interest thereon in account current between himself and *others* with the defendant, (N. R.) who were successively partners with the defendant, until the 31st day of December, 1814.

The plea then stated all the particulars of the partnerships, and who the successive partners were, and how the various firms were composed, and averred that the said sum of \$1,610,45, was continued upon the books of the various firms to the credit of said testator until December, 1814, when an account was stated between the testator and the defendant, N. R. *in fact* but under the name of N. Rogers & Son, wherein credit was given to the testator for the aforesaid sum of \$1,610 45-100, together with interest thereon, making altogether the sum of

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1929.

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Rogers.



\$2,069.37-100, which last mentioned sum was included in the balance for which the note specified in the declaration was given.

The plea then further stated, that Lambert made said entries in the books, in discharge of himself, under an expectation that his share of the profits arising out of uncollected debts due to said firm would equal the amount for which he had made the entries, whereas, it was afterwards ascertained that no profits had accrued to said Lambert from any outstanding debts, whereby the amount of said entry of \$1,610, 45-100, to the credit of said testator together with the interest thereon included in said note "had become erroneous, null and void."

The second plea set forth the partnership between the defendant, the testator and Lambert as in the first plea, and that Lambert kept the books of the firm. That in December, 1895, the testator's name was withdrawn from the firm, and his son, Henry Rogers became a partner therein. That this partnership between the defendant, Lambert and Henry R. continued until the year 1908, when the last named partner died. That after his death a statement of the concerns of the firm was made by Lambert, whereby it appeared that there would probably be an amount of profits to be divided among the partners arising from uncollected debts, and that Henry R. would be entitled to one-sixth part of such profits. That the testator, as the heir at law of Henry R. and as his administrator, requested the other partners to charge to him (the testator) all such sums as ought to be charged to his said son, and to credit him with such an amount as Henry R. was entitled to receive. That thereupon, Lambert upon estimating all the debts due to the firm, found that they amounted to \$30,000; one sixth part of which was contingently credited to the testator, with a distinct understanding that if the collections should fall short of said estimate, a proportionate deduction should be made from said credit of \$5000. This credit was continued until the date of the note, on the books of the various firms, viz : on the books of the original firm until 1891, when the defendant Jeremiah R. associated with him in business one Fitch Rogers, Jun., son of the testator, and the defendant Samuel Rogers, under the firm of N. Rogers, Son & Co. Portions of the aforesaid

debts were collected by this firm until May, 1814, when Fitch Rogers, Jun., retired from the same, and afterwards the collections were continued by the remaining partners under the name of N. Rogers & Son, until the 31st of December, 1814, when an account was stated between the said Nehemiah in fact, (but in the name of N. Rogers & Son,) with the said testator, in which the said sum of \$5000 was included. For this balance the note specified in the declaration was given, under the supposition that it was actually due, without any examination as to the actual amount of collections made. The plea then stated, that since the date of said note, it had been finally ascertained, that the collections made by the said firm of which the said Henry R. deceased was a partner, were not sufficient to cover the actual losses of said firm, and would not amount to the sum of \$30,000., whereby said note for \$8000 became "erroneous, null and void." The plea then concluded with an averment, that the said sum of \$5000 with the interest thereon was equal to the amount of said note, and the interest on the same, which the defendant was ready to verify, &c.

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To these pleas the plaintiffs demurred, and for causes of demurrer to the *second* plea, assigned the following, viz:

I. That the *second* plea mentions and refers to the *bill of particulars*, as if the same had been pleaded and made part of the record.

II. That the *second* plea alleges "that \$5000 were then and "there credited contingently to the said testator" "upon the distinct understanding," &c. without alleging upon *whose* distinct understanding, &c.

III. That the same plea is argumentative and by way of rehearsal and not distinct and positive, in that it alleges that the *name* of said testator was withdrawn from the firm, without alleging whether the testator himself withdrew therefrom, &c. Neither does it state whether *at the time* said note was given, there was any *understanding* that its amount should be corrected, in-

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creased or diminished, according to the collections actually made, but leaves the same to inference and argument.

IV. The second plea is uselessly encumbered with long and informal statements and allegations.

Upon the argument of the demurrer, *Mr. Sedgwick* for the plaintiffs presented the following points.

I. That the first plea was bad because it purports to answer the *whole* declaration, but contains no answer whatever to the second count, and goes only to a *part* of the first count.

II. The first plea is bad because it seeks to open the partnership accounts between the testator, Nehemiah Rogers and David R. Lambert, when the only remedy which the defendants have, if there be any, is to be found in a court of equity. The same plea is also bad, because it amounts to a set-off, which cannot be pleaded.

The second plea is bad, for the reasons already set forth in the first point, and because it involves the whole or the greater part of the partnership accounts of Rogers, Lambert & Co., the subject matter whereof, being founded in misapprehension and mistake, is properly subject to the jurisdiction of a Court of Equity only, to the exclusion of the jurisdiction of a Court of Law.

When the cause was called for argument, the court deemed the objections taken by the plaintiffs in the second and last points, as conclusive, against the pleas and gave judgment for the plaintiff without any observations from either counsel; the same points having been decided in the previous case.

*Judgment for the plaintiff on the demurrer.*

[D. D. Field, *Att'y for the plff.* A. G. Rogers, *Att'y for the def't.*]

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In an action of slander no evidence can be given of any loss or injury sustained by the plaintiff, unless the same be specially stated in the declaration, and this whether the special damage be the gist of the action, or whether the words be actionable *per se*.

Where, therefore, under the allegation, that, in consequence of the speaking of the slanderous words, "*certain Insurance Companies in the city of New-York, refused to insure any vessel commanded by the plaintiff, or any goods laden on board any vessel by him commanded,*" the plaintiff was permitted to prove that the *New-York Insurance Company* refused to make such insurance; the evidence was held to have been improperly admitted.

In this action, the plaintiff cannot give evidence of the fairness of his general character, until it is attacked by the defendant; and the fact, that a justification has been pleaded, makes no difference in the rule.

Where the plaintiff, therefore, was allowed to give evidence of his general good character, after the defendant had gone through with his defence, without impeaching such general character, this evidence was also held to have been improperly admitted.

THIS was an action of slander, tried before Mr. Justice HOFFMAN, on the 22d day of December 1828.

The declaration contained four counts. The first set forth, that the plaintiff was "a ship master and ship owner," and *as such* had "obtained the good opinion and credit of his employers and others." That the defendant, with the intent "to cause it to be believed by his employers and other citizens, that the plaintiff was dishonest and unworthy to be trusted with the command of a vessel as captain thereof, or with the charge of merchandise to be shipped on board of any vessel which might be commanded by him, and to prevent certain incorporated companies in the city of New-York from underwriting goods shipped and to be shipped on board the said vessel, and thereby, otherwise to injure him in his said calling,"—"On the 26th day of May" 1828, "at the city of New-York," "in a certain conversation," "then and there had in the presence and hearing of divers" "citizens, of and concerning the plaintiff" and "*his calling*" "and of and concerning a certain voyage by the said plaintiff then lately made, as mas-

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"ter" "of a certain ship" "from Carthagena to the city of New-York," "and of and concerning a certain quantity of fustic on board said vessel during the said voyage, and of and concerning the conduct of the plaintiff in rendering an account of the number of logs or sticks of fustic so on board said vessel as aforesaid, did falsely and maliciously speak and publish of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following," that is to say, "he (the plaintiff) sawed up wood to make it hold out." [*Inuendo*, setting forth the meaning of the words.] "By means" "of which," "the said plaintiff hath been" "greatly injured" "as a ship-master and ship-owner," "inasmuch" "that divers" "citizens" "have suspected and believed the plaintiff to be dishonest and unfit" "to be entrusted and employed as a ship-master, or in the command of a vessel, or with merchandise to be laden on board any vessel by him commanded," and "certain Insurance Companies in the city of New-York aforesaid, have, thereby, and on no other account whatever, refused to insure any vessel commanded by the said plaintiff as such ship-master," "or any goods laden on board of any vessel by him commanded."

The second count charged the defendant with having declared, in "a certain other discourse" "of and concerning the plaintiff in the line of his calling as a ship-master, that he had discharged the plaintiff, from his employ, for dishonest conduct;" "and that if any further information was wanted as to the character of Captain Shipman, they (the persons to whom the words were addressed) could send to the office of the defendant."

The third count charged the defendant with having written and published the same words set forth in the first count "in the presence and hearing of the officers of divers Marine Insurance Companies in the city of New-York," by reason whereof, "divers citizens and neighbours" "refused and declined to retain and employ the plaintiff as a ship-master "or otherwise, or to ship or freight any goods or merchandises on board of any vessel while commanded by him."

The fourth count alleged that the defendant, on the same day and year, and at the place aforesaid, wrongfully, maliciously and

unjustly "did make, publish, write, and utter" "in the presence and hearing" "of the officers, to wit, the President, Secretary and Directors of divers Marine Insurance Companies in the city of New-York, the following false, scandalous, malicious and defamatory libel, of and concerning the plaintiff," "in substance and effect as follows, that is to say, that he (the plaintiff) had sawed up wood" "to make it hold out;" (with inuendos as to the meaning of the words,) "by means whereof, the said President, Secretary and Directors, of the said Marine Insurance Companies," "refused and declined to insure a certain ship or vessel," "called Bunker-Hill, then under the command of the plaintiff," "or any goods or merchandise laden or to be laden on board said ship or vessel," on her intended voyage to a foreign port; and by reason thereof, certain shippers or freighters, were deterred and prevented, from lading goods and merchandise on board said ship," whereby "the plaintiff's intended voyage," "was delayed and defeated."

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The defendant pleaded the general issue, and gave notice of the following special matter to be offered in evidence at the trial, viz :

That before the speaking and publishing of the words "in the first and second counts" mentioned, the defendant "had heard from and been told by one George Hughes, first officer of the packet brig Medina, being the ship and vessel in the declaration mentioned, of which the said plaintiff was master," that he had been directed by the plaintiff "to make the number of sticks of fustic on board said vessel to hold out, and if necessary in order to do so, to saw and split the said sticks:" and that the plaintiff at the time of uttering the words charged in the declaration, declared to the persons in whose presence they were spoken, "that he had heard and been told the same by the said George Hughes."

And for a further plea, to the second count, the defendant set forth, by way of justification, that on the first day of May, 1826, the plaintiff was master of the packet ship Medina, of which the defendant was owner. "And that on board the said vessel and whilst the said plaintiff was master, there had been shipped a quantity of hides of excellent quality, consigned to one Jeharasy of the city of New-York, which hides the said plaintiff

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"caused to be mixed up with and exchanged for hides" "belong to him," "of greatly inferior quality," and "caused the said inferior hides" "to be delivered to the said Jeharasy in the place of" those originally consigned to him. "Wherefore the said defendant," "did speak and publish the said words," &c., "in the said second count mentioned, as he lawfully might for the cause aforesaid."

The plaintiff joined issue, upon this plea of justification, denying that he exchanged the first mentioned hides for others of inferior value, &c.

At the trial, the plaintiff called one Alexander Thompson as a witness, who testified, that he was the *Inspector of the New-York Insurance Company*. That he was present at a conversation which took place between the defendant and Mr. McEvers the President of that Company, in May, 1828. The defendant said, that he had discharged the plaintiff from his employment, for malpractice or dishonesty, as to the marking of some hides and cutting a log of dye-wood in two. The defendant accused the plaintiff of having marked and changed hides of a superior quality for those of an inferior quality and of less value, and of cutting the logs of dye-wood to make them hold out. That Captain Shipman had been in the defendant's employment in the Tampico and Vera Cruz trade, and understanding that there was like to be a deficiency in the logs, Captain Shipman directed the mate to cut them in two to make them hold out. *The Company refused to insure the plaintiff in consequence of this information.*

To the question, which elicited this last answer, the counsel for the defendant objected, on the ground, that *the special damage* was averred *too generally* in the declaration, to let in the proof: but the objection was overruled by the presiding Judge.

The witness then further testified that the vessel, on which the said company refused to make insurance, was the *Bunker-Hill*. That the plaintiff's character had always stood fair with the company until the time of said conversation, but after that, they refused to insure for the plaintiff, "until he had cleared up his character."



On his cross-examination the witness further testified, that the defendant, at the time of the conversation, stated, that he had his information from Mr. Hughes, the plaintiff's first mate, who said he was directed by the plaintiff to cut the sticks and mark the hides.

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Upon this testimony the plaintiff rested his cause.

The defendant then introduced the deposition of Hughes, the mate, in evidence, and called Jeharasy and several others as witnesses, to prove that the marks of a number of hides brought in the ship Bunker-Hill (of which the plaintiff was master) from Carthagena to New-York, and consigned to Jeharasy, had been altered by the direction of the plaintiff, and that those hides, had been exchanged by him, for others, of inferior quality belonging to himself; the inferior ones being intermingled with the good ones, and delivered by the plaintiff to Jeharasy. The defendant also read the deposition of Hughes, and produced some other testimony to prove that the plaintiff had *directed* the mate, if necessary, to cut and split some of the sticks of fustic, brought home in the same ship, for the purpose of making their number correspond with those taken on board in South America. The defendant also introduced evidence, for the purpose of showing, that he was not actuated by malice in making his communications, having done what he deemed to be his duty.

The plaintiff on his part then called a number of witnesses, to rebut the whole of this evidence, and to impeach the accuracy of Hughes' deposition. But as this testimony has no material bearing upon the questions of law *decided* by the court, it is omitted here.

During the course of the trial, the plaintiff called Thomas H. Merry as a witness; and in the progress of his examination, he was asked by the counsel for the plaintiff, "what the *general character* of the plaintiff was?" To this question the counsel for the defendant objected, upon the ground that the *general character* of the plaintiff had *not been put in issue*, nor *impugned* by the defendant.

The objection was overruled by the Judge, and the witness testified, that he had known the plaintiff for several years, and that

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his character was good. The plaintiff's counsel then subsequently examined *several other witnesses* upon the *same point*, and they gave the *same answer*. The plaintiff also called one Henry Austin as a witness, who testified, that the plaintiff at the time of his difficulty with the defendant, commanded the Bunker-Hill. That the plaintiff had purchased that vessel, but owing to the difficulty with the defendant, the bill of sale was not delivered to him. *That the company having refused to insure for the plaintiff, he could not procure sufficient credit to pay for the vessel.*

John Austin, a witness called by the *defendant*, also testified to the same point, and stated that he himself applied to the New-York Company, for insurance on the freight of the Bunker-Hill, but that the president refused to insure, on account of the defendant's statements.

The Judge charged the jury, that he had doubts whether the words stated in the declaration, were actionable in themselves, without an allegation of special damage ; but for the purposes of their decision they were *to be considered* as actionable. That the slander, charged in the declaration, might be disproved by the fact, that the occasion on which the words were spoken, and the purposes of the defendant, might be such as to justify their being used. That if Hughes had made the statements, set forth in the defendant's notice, to the defendant, and the latter believing them to be true, had communicated them to the Insurance Company, with good motives and for justifiable purposes, then, no malice could be inferred from the speaking of the words. But if on the other hand, the communications had been made by the defendant, for the purpose of injuring the plaintiff, and with a view to put down all rivalry in the trade in which he was engaged, they could be by no means justified. If Hughes spoke falsely, relative to the hides and fustic, but was believed by the defendant, and if the latter communicated his statements, with good motives and for justifiable ends, to the company, giving at the same time the name of his author, then the defendant must be acquitted ; for in that case, *Hughes* would be deemed the slanderer and not Burrows.

That the defendant, having pleaded a justification of the words charged in the second count of the declaration, was bound to assume the affirmative and prove their truth. Whether he had done so, was a question of fact for them to consider: and if they put confidence in the testimony of Hughes, corroborated by that of the defendant's other witnesses, the weight of testimony was probably with the defendant. But if, on the contrary, they thought that the plaintiff had successfully rebutted the defendant's evidence, and if they believed that the defendant was actuated by malicious motives, *exemplary* damages in such case could not be deemed improper.

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The jury returned a verdict in favour of the plaintiff for *one thousand dollars* damages and six cents costs.

The defendant now moved for a new trial:

I. Because proof of special damage was not admissible under the pleadings.

II. Because evidence of the plaintiff's general good character was inadmissible, until put in issue by the defendant.

III. The verdict was against law and evidence.

IV. The damages were excessive.

There was also a motion in arrest of judgment for defects in the declaration.

*Mr. D. Graham and Mr. Ogden Hoffman*, for the defendant, as to the first point, contended, that the special damage was not set forth with sufficient certainty in the declaration, to entitle the plaintiff to introduce any evidence to prove it. The rule is, that the special damage must be so stated, that the defendant may come prepared to meet the charge. It is not enough to set forth in general terms, that "*certain Insurance Companies* in the city of New-York" "refused to insure any vessel commanded by the plaintiff;" but the *particular* insurance company or companies, which so refused should have been specified in the allegation.

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How could the defendant come into court prepared to meet a charge so general in its terms? Was he bound to make inquiry at every insurance office in the city of New-York, and ascertain whether *that* particular company was the one referred to in the declaration? Or was not the plaintiff rather, (who of course knew to which company he referred,) under every legal obligation to point out to the defendant the exact charge he intended to prove? When it is said that the plaintiff was bound to set forth with exactness the particular individuals, who refused to make insurance for the plaintiff, we mean that he was thus bound, if he expected to *give evidence, under the charge, at the trial.*

The words in the first count are clearly not actionable *per se*, and the rules of pleading are of course directly applicable to *that*; and the same remark might be extended to the third and fourth counts, were it necessary to examine them. To make words actionable from their application to the plaintiff's calling, they must relate exclusively to that specific employment, and connect themselves with it *per se*. They cannot be extended by inuendoes beyond their natural meaning, so as *thereby* to be converted into a cause of action. Here the inuendoes extend the meaning of the words not actionable, into such as may be slanderous. But the two last counts may be laid entirely out of the question, for there was *no* evidence offered at the trial to sustain them. The plaintiff did not pretend to support the charges laid in those counts, or to show that the defendant had ever reduced his remarks concerning the plaintiff to writing in any form. It is perfectly clear, that if the words themselves are not actionable, then the special damage *must be* set out in the declaration. In this case, however, the declaration does not allege any injury to the *plaintiff*, from a refusal on the part of the company to insure for him. It states the injury in the most general terms, and the court cannot, by *intendment*, say, that the injury fell upon the plaintiff.

But, if we suppose the words to be actionable *per se*, then the plaintiff was not bound to state any special damage, and the general allegations would have been sufficient. If stated, he

was under no obligation to prove the special damage, but might have treated that part of his declaration as a nullity, and have passed it by. But the complaint is here. The plaintiff has attempted to allege special damage, and has stated it incorrectly: under these circumstances, he ought not to have been permitted to prove it. We object, not to the statement of the special damage in the declaration, but to the proof which was let in under the improper or imperfect allegation. The evidence thus offered, must have had a serious effect upon the minds of the jury; for it brought down a general charge to a point, so that the plaintiff's loss was made certain and tangible. Witnesses testified, that the New-York Insurance Company refused to underwrite upon the plaintiff's property in consequence of the defendants' imputations. They went farther, and showed that the plaintiff's credit was so injured thereby, that he could not pay for the vessel which he had contracted to purchase.

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The damage thus proved was special in every sense of the word, and that proof had a powerful tendency to produce a verdict against the defendant. Had he known before the trial that it was the New-York company, which refused to effect the insurance, then he might have come prepared to explain the circumstances under which the charge was made, and the motives, which induced him to make it.

In the second count, the damage is laid more broadly than the charge will warrant, and it may be deemed defective for this. But we rely upon the general proposition, that the evidence was improperly admitted. [2 Starkie Ev. 870. pt. 4. 1 Chit. Plead. 369. 1 Saund. 243. b. n. 5. 10 John. Rep. 283. 1 Siderfer, 396. 1 Roll's Abr. 58. Bull. N. P. 7. 2 Phil. Ev. 108. Starkie on Slan. 322.]

II. Evidence of the plaintiff's general character was also improperly admitted. The action of slander, it is true, puts the plaintiff's character in issue as to this: *it exposes it to the defendant's general attack*. If a person has spoken slanderous words of another, whose character is infamous, that general character may be proved by the defendant at the trial, to show that the plaintiff

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is not worthy to receive damages. But if the defendant abstain from any such attack, then he admits the plaintiff's general character to be good, and the latter will not be permitted to inflame the minds of the jury by introducing evidence of his general recitude.

The reason is this : the evidence must be confined to the issue. If the issue be as to a particular fact, then the testimony must be confined to that, because the verdict must be rendered from the facts, and not from the plaintiff's *general character*. A person of spotless general reputation, may be guilty of the particular act laid to his charge, and the minds of the jury are not to be drawn away from the facts relative to the charge by any extraneous proof.

Evidence of the plaintiff's *rank* and *condition* in life may, in some instances, be given for the purpose of graduating the damages by a proper standard. So in some cases the plaintiff may give evidence of his *conduct* where *that* is the subject matter of the charge. For instance, if a captain of a vessel were charged with improperly carrying too much sail from drunkenness, he might give evidence of his general conduct in that particular. But the rule is inflexible, that the plaintiff can never give evidence of his general character in an action of slander, until it is put in evidence by the defendant himself. [1 *Camp. R.* 460. *Fowler v. The Aetna Ins. Co.* 6 *Cowen R.* 675. *Stow v. Converse.* 3 *Con. Rep.* 325. 345. *Larned v. Buffington.* 3 *Mass. Rep.* 546. 2 *Bos. and Pul.* 284.]

[The counsel for the defendant also went into an elaborate examination of the third and fourth points, and of the motion in arrest of judgment. But as the court gave no opinion upon these points, the arguments are omitted.]

*Mr. J. Anthon* for the plaintiff, *contra*.

I. The words in all the counts being introduced with a *colloquium* as to the plaintiff's profession or calling are actionable *per se*; and if so, then the averments of special damage will not vitiate the declaration. Where the words are not actionable in

themselves, but the *special damage* is the *gist* of the action, then the averments of that damage must be precise. No matter how humble the calling of an individual may be, words spoken of him in relation to that calling, which have a tendency to injure him in it, are held to be actionable. [1 *Lev.* 115. *Demarest v. Harding*, 6 *Cowen's Rep.* 76. *Mott v. Comstock*. 7 *Ib.* 654. *Burtch v. Nickerson*, 17 *John. R.* 217.]

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If the words used by the defendant are actionable when applied to a *ship-master*, then the colloquium sufficiently connects itself with the averment. The first count states, that the injurious words, were spoken with an intent "to cause it to be believed" "that the plaintiff was dishonest and unworthy to be trusted with "the *command of a vessel as captain thereof*." It then avers that the words were uttered in a conversation concerning the plaintiff and "*his calling*" and concerning a certain voyage then lately made by him as *master of a certain ship*. Can there be any doubt then, that *such* words, thus uttered, must naturally be deeply injurious to the plaintiff in the line of his calling? If so, then they are actionable *per se*, without any allegation of special damage; and the special damage is merely in *aggravation* of the general damage, and it need not be so precisely stated as where it forms the gist of the action.

As matter of aggravation, the special damage is averred with sufficient precision. If the averment is defective in *form*, then the defendant should have *demurred*, and he could not take advantage of the defect at the trial.

He is now driven on that point to his motion in arrest of judgment. But the matter alleged in aggravation, was a natural result of the slanderous words, and as the jury might, under a general count, have been called upon to infer it, it was admissible in evidence without averment. The matter in aggravation was not merely the refusal to insure, but the consequences resulting from the refusal: viz. the loss of freight by persons refusing to ship, when they could not insure. The plaintiff at the trial, abandoned this matter of aggravation; having only *proven the refusal to insure*, he went into no proof of consequential loss of freight.

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But the second count is good beyond all doubt, and the defendant's counsel admit that it is. The words in that count are of themselves actionable, and where that is the case, the averment of special damage will not prejudice the declaration ; [*Starkie on Slan.* 365.] and it need not be averred with any precision. [*Starkie on Evid.* book 4., p. 871.] The verdict being general, one good count is sufficient to uphold it, and if need be, the Judge's notes can be referred to, for the purpose of directing the judgment to the second count. [7 *Cowen's R.* 728.]

As to the evidence of special damage, it was confined to the testimony of Thompson, and the refusal of the *New-York Company* to insure. The refusal to insure was no damage *per se*. The court will, therefore, sustain the verdict if possible, without inferring that the jury gave damages on that score. [1 *Bin. Rep.* 185. *McMinney v. Birch.*] There is a fallacy in the supposition that the defendant did not come to the trial prepared to meet the very proof of special damage which was offered. The declaration stated that *certain Insurance Companies* refused to insure, and the defendant well knew *where* his attack upon the plaintiff had been made. He in point of fact could not *but* have known, that it was the *New-York Company* which refused to insure, and he was not taken by surprise. The court will not infer that the verdict was given by the jury for the *special damage*, but on account of the *general aggravation* of a charge, maliciously made, which they believed to be untrue. The defendant has not, therefore, any real cause of complaint on this ground, and the court will not grant him a new trial unless, substantial justice requires it.

II. The proof as to the general character of the plaintiff was not offered until after the defendant had gone into his justification, and charged the plaintiff with dishonesty amounting to a felony. It was therefore admissible, first to rebut the charge, and second, to aggravate the damages. The plaintiff had a right to offer the evidence, after the defendant's proof, for the purpose of showing to the jury, that it was in no wise probable, that any man of good character would descend to the contemptible conduct with which he was charged ; especially where the whole of the defendant's



evidence was controverted, and the facts charged against the plaintiff were left in doubt.

In an action for a libel, where the defendant justifies, the plaintiff may offer his character in evidence, before he is attacked at the trial; especially where the defendant's charge imputes a crime to the plaintiff. The very imputation takes away the presumption of good character, and the plaintiff ought upon every principle, to be permitted to show what his true character is. [*Stark. on Ec.* 367 370., *Book 4. King v. Waring*, 5 *Esp. R.* 13. 3 *Mass. Rep.* 546. *Harding v. Brooks.* 5 *Pick. Rep.* 244.]

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III. The damages are such as the Judge contemplated and charged the jury to give, if they disbelieved the testimony of Hughes and should come to the conclusion that the slander was circulated by the defendant to put down the plaintiff's rivalry in trade, and this matter was entirely within their province. Besides this, the evidence was sufficient to warrant them in coming to that conclusion.

IV. No new trial can be granted for excessive damages, unless they are so flagrantly excessive as to evince corruption or prejudice on the part of the jury. [*Townsend v. Hughes*, 2 *Mod. R.* 150. *Beardmore v. Livingston*, 2 *Wil.* 248. *Sharpe v. Brice*. 2 *Sir W. Black. R.* 942. *Gilbert v. Bertinshaw*, 1 *Coup.* 231. 4 *Term R.* 651. *Coleman v. Southwick*, 9 *John. R.* 51. *Southwick v. Stephens*, 10 *Ib.* 443. *Grant on new trials.*]

THE CHIEF JUSTICE in delivering his opinion, observed, that a new trial ought to be granted upon the ground, that the evidence as to special damage was improperly admitted: that the averments in the declaration were not sufficiently definite to allow such evidence to be given on the part of the plaintiff. The first count alleges, that the defendant with the intent to cause it to be believed, that the plaintiff was dishonest and unworthy to be entrusted with the command of any vessel, "and to prevent certain Insurance Companies in the city of New-York from under-

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"writing goods," &c., uttered the words complained of. The fourth count sets forth, that the defamatory words were uttered and published in the presence and hearing of the President, Secretary and Directors of *divers* Marine Insurance Companies in the city of New-York, by means whereof the said Marine Insurance Companies refused and declined to insure a certain vessel called the Bunker-Hill, &c.

Now these general allegations, it is obvious, would give the plaintiff at the trial the range of *all* the Insurance Companies in the city of New-York, as to his proof of special damage. But the defendant would be wholly unapprised of the particular company, which the plaintiff intended to prove to have refused to make the insurance, and of course would have no opportunity to prepare himself to rebut or explain the evidence, which might be offered against him.

The rule is well settled, that no evidence can be given in an action of slander, of any special damage sustained by the plaintiff, unless it be particularly set forth in the declaration. The object of the rule is to prevent the defendant from being taken by surprise. In the present case, the plaintiff was permitted under this declaration, (which refers in general terms to *certain* Insurance Companies,) to prove that the *New-York Insurance Company*, refused to insure the plaintiff in consequence of information communicated by the defendant to their president. The defendant being unapprised of the particular company referred to by the plaintiff in his declaration, had no opportunity of showing the circumstances under which his information was communicated, and of course, may have been taken by surprise. The averment of the special damage was altogether too loose, and general to admit the proof, and for this reason there should be a new trial.

THE CHIEF JUSTICE further remarked, that he should give no opinion upon the other point, as to whether the evidence of the plaintiff's general good character was admissible under the circumstances or not. But that the evidence admitted by the Judge of special damage, being improperly received, he was of opinion that there must be a new trial, the costs to abide the event of the suit.

HOFFMAN, J. This was an action of slander, tried before me at the last December Term of this Court. The defendant moves in arrest of judgment and also for a new trial, on the ground that improper testimony was admitted. I do not consider it necessary to determine the first question, as, after much reflection, and an examination of the authorities cited on both sides, I have arrived at the conclusion, that a new trial ought to be granted. The declaration sets forth the situation of the plaintiff as a ship-master, the uttering of the slanderous words by the defendant, and that by reason of the same, "certain Insurance Companies in the city of New York, refused to insure any vessel commanded by the said plaintiff, as such ship-master, or any goods laden on board any vessel by him commanded." The plaintiff produced as a witness to support his right of action Alexander Thompson, who testified, that the words charged in the declaration were spoken by the defendant in the office of the New York Insurance Company, of which office he is the Inspector; and that the said company refused to insure the plaintiff, in consequence of the information given by the defendant, until the plaintiff should clear up his character; and that the vessel so refused to be insured was the Bunker Hill, &c. To this testimony the counsel for the defendant objected.

It appears to be a well settled rule of law, "That no evidence shall be received of any loss or injury which the plaintiff has sustained by the speaking of the words, unless it be specially stated in the declaration:" [1 *Saunders*, 243, note 5.] Nor is it material whether the words be actionable *per se*, or not. Formerly less particularity was required, when the words were actionable *per se*, than when they were not; but Williams, in his notes to *Saunders*, to which I have referred, observes, "that modern practice does not warrant the distinction, and that it is now fully established, that the special damage in each case must be alike particularly specified in the declaration." This rule has been sanctioned by all the decisions in the English courts, and by the decisions in our own, as far as I have examined them. In confirmation of the principle, I refer to the cases cited by Williams, in his notes to the case of *Craft v. Boite*, to

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*I. Chitty on Pleading*, 385, 386, and to the case of *Herrick v. La-pham*, 10th John. 281. If this rule be correct, (and that it is I have no doubt,) let us apply it to the particular case before us. Under the *general* allegation, that *certain* Insurance Companies refused to insure, the plaintiff was admitted to prove that a *particular* Insurance Co., to wit, the New York Insurance Co., refused, &c. The reason of this rule is an obvious one. The particular persons by whom the plaintiff was injured, in consequence of the defamatory words, must be within his own knowledge, and they must be so particularized in the declaration, as that the defendant may have notice of the cause of complaint, and be enabled to meet it, if the charge be false, &c. [1 *Chitty*, 857.] If the *New-York Company* had refused to insure, the plaintiff must have known the fact, and he had no right to conceal that knowledge, and throw the burthen upon the defendant of preparing his defence, by making inquiries of every Insurance Company in the city of New-York, under the uncertainty to which particular company the plaintiff might direct his proof.

The counsel for the plaintiff, however, contends, that as the words were actionable *per se*, this particular testimony became unimportant. This undoubtedly would be a good objection to a demurrer to the declaration, upon the generality of the averment of the special damage; but the objection here, is not to the *pleadings*, but to the *proof*, which was admitted under the pleadings. And I have already shown, that the rule is as inflexible, when the words are actionable, as when they are not. A further answer is offered by the counsel for the plaintiff, that the refusal to insure, as proved by captain Thompson, did not amount to any proof of special damage, as they did not follow it up by showing, that in consequence of such refusal the plaintiff lost any freights or other advantages. The question, however, still recurs, why or for what purpose did they offer it? If it could amount to nothing, why did they persist in offering it, after the objections of the counsel for the defendant? If the testimony was not authorized by the pleadings, and the law by which those pleadings are to be governed, it ought to have been rejected as irrelevant. But it cannot be denied, that with a jury in a commercial city, and

composed in part, at least, of commercial men, that the injury or damage that would result from a refusal to insure by a respectable company, on account of charges made against an individual making the application, is so immediate and apparent, that it must and would have a decided influence upon their minds in the verdict that they would render. It would be considered by them as an *injury* done to him, and the proof of such injury would be admitted, in violation of the rule, "That no evidence of any loss *or injury* shall be received, unless particularly stated in the declaration." [1 *Saunders*, 243. *note*.]

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But even if this answer of the plaintiff's counsel should be admitted to have force, as respects the testimony of captain Thompson, does it apply to the testimony of Henry and John Austin, who were also produced by the plaintiff, subject to the objection of the defendant's counsel? Henry Austin testified, that the plaintiff commanded the *Bunker Hill*; that he purchased her, but that the bill of sale was not delivered on account of the difficulty with the defendant, and that the company having refused to insure, the plaintiff could not procure sufficient credit to pay for the vessel, that the witness and others who had been concerned in the purchase were injured as well as the plaintiff. John Austin testified that he applied to the New-York Insurance Company for insurance on the freight of the *Bunker Hill*; that the president refused to insure on account of the statements of the defendant; that the *Bunker Hill* had been bought by the plaintiff, but the bill of sale had never passed. He could not remember the names of the applicants for freight, nor who had refused to give it, because the office would not insure until the plaintiff's character should be cleared up.

This testimony is to be taken in connection with the previous testimony of captain Thompson, who had proved, that in consequence of the alleged slander of the plaintiff, the N. Y. Co. had refused to insure. And H. Austin testifies, that in consequence of this refusal, the plaintiff was prevented from consummating a contract which he had entered into for the purchase of the *Bunker Hill*, and that no bill of sale was delivered to the plaintiff, because, on account of such refusal by the company, he could not procure

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sufficient credit to pay for the vessel. This testimony appears to me not only to make out an injury sustained by the plaintiff, but amounts to proof of a clear technical special damage sustained. The ordinary cases in which special damage is alleged to support words not in themselves actionable, are those in which, by reason of the words, the plaintiff lost the benefit of some contract which he would otherwise have had. It is so, "When a communication or treaty of marriage is alleged, and the marriage was lost by reason of speaking the words." [*Moody v. Baker*, 5 Coven, 353. *Opin. of Woodworth, J.*] It is so in the usual cases of slander of title, although in these latter, the plaintiff is prevented from selling, on account of the slander: and the general rule undoubtedly is, "that when the plaintiff is prevented from succeeding to any preferment, benefit, or advantage whatever, by reason of the slanderous words, he may maintain an action for the special damages." [*Starkie on Slander*, 160.]

The law would therefore presume that this contract for the purchase of the Bunker Hill would have been a gainful contract to him, and even if it did not, H. Austin's testimony removes all doubt, by clearly proving that the plaintiff, as well as the witness and others who were concerned in the said purchase, were expressly injured by the purchase not being consummated. Had the plaintiff consummated the purchase, as he might have done, had it not been for the slander, he would have been entitled to the freight of the Bunker Hill; and J. Austin proves that applicants for freight refused to give it, because "the offices would not insure." By what averment in the declaration was this testimony covered? So far from being particularized, there is hardly a general averment that would embrace it; and if the rule be as I have stated it, the particular persons with whom the contract was made for the purchase of the vessel, ought to have been named; and unless so named, the testimony ought not to have been received. If not admitted to prove special damage, it was not admissible to aggravate the damages by proving a particular damage or injury in addition to the general one that the law infers. I am therefore of opinion, that I erred upon the trial in admitting the testimony I have referred to. I may be permitted to say, that the testimony was ad-

mitted by me with strong doubts, which I expressed upon the trial at the time, and in the absence of all authorities. Subsequent examination, and the arguments of counsel, have satisfied me that I was wrong, and I am free to retract the error.

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The second point on which the defendant relies is, that the plaintiff was allowed to prove his general character, without any impeachment of it by the defendant, except so far as the particular facts proved in justification, imputed dishonest conduct to him. The plaintiff insists that he had that right, as the justification of the defendant, and the evidence offered under it, directly charged the plaintiff with dishonest conduct, and that the plaintiff might therefore show his general character for honesty and integrity, to rebut the specific facts proved by the defendant, or the inference to be drawn from them. To sustain this position, the plaintiff relies upon the practice in criminal proceedings, where the person indicted is allowed to meet the specific proof of the charge laid in the indictment by evidence of his general character. This, however, is an exception to the general rule, and is recognized as such exception in all the books. The case of *The Attorney General v. Bowman*, cited in the note to 2 Bos. and Pul. 532, is in point. That was an information, proceeding against the defendant on a charge of corrupting officers and keeping false weights. The very essence of the proceeding was founded upon proof of corruption on the part of the defendant; but the prosecution was for the *penalty*, and not for the crime. To meet this proof, testimony was offered of the general character of the defendant, to show that he was incapable of committing such a crime. But the testimony was overruled. Eyre Ch. B. says, I cannot admit it in a civil suit: in a direct prosecution for a crime, such evidence is admissible. If such evidence is admissible in this case, it would be necessary to try character in every charge of fraud. The rule that prevails in criminal cases, does not therefore apply: and to the decisions in civil cases in similar and analogous ones must we refer for the true rule to govern us in this particular cause.

The circumstance of a justification being pleaded, can be, I should apprehend, of no farther importance, than as it affects the

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right to introduce the testimony on the part of the defendant, tending to prove the charges against the plaintiff: for if by the rules of pleading, he had been allowed to do it under the general issue, the principle would still be the same; and that principle, if it be correct, must be, that when the defendant is allowed, under the pleadings, whatever they may be, to prove substantive facts of fraud, on the part of the plaintiff, that the plaintiff may meet those facts by proof of general character. I do not find that this principle has ever been sanctioned, except in the case cited from *5th Esp. p. 13. (King v. Waring and wife,)* which is a solitary case—a *nisi prius* decision—and is contrary to the general spirit of all the cases governing similar circumstances.

A contrary principle is recognized by Lord Ellenborough in *Bamfield v. Massey*. [1 *Camp.* 460.] by our Supreme Court in *Fowler v. Aetna Ins. Co.* [6 *Coven.* 673.] In this last case, the defendant, offered evidence of fraud on the part of the plaintiff, and the plaintiff met this charge by proof of his good character for integrity. Chief Justice SAVAGE says the testimony was improperly admitted, and observes that every man must be answerable for every improper act, and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties. This principle I conceive must be equally applicable to a case of slander, except that in such action the defendant is allowed to impeach the general character of the plaintiff, (a question that is now settled, although upon it formerly the court were divided; and when that is done upon his part, the plaintiff is allowed to meet such general impeachment by proof of general good character on his part.

But a case very similar to this, has been expressly decided by the Supreme Court of Errors of the state of Connecticut. [*Converse v. Stow*, 3 *Conn.* 325.] That was a case of libel, charging the plaintiff with dishonest practices. The defendant justified, and in answer to his proof, the plaintiff offered his general good character in evidence. The court decided that the testimony was inadmissible, and the opinion is not only entitled to weight as the decision of a court of a sister state, but also from the general



reasoning and able opinion of Chief Justice Hosmer in support of it.

I have gone more at length into the examination of these questions, than I should otherwise have done, from the circumstance, that the cause was tried before me, and that it was through my ruling that the testimony was admitted. I think the defendant is entitled to a new trial.

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[After delivering this opinion, Judge HOFFMAN remarked, that the case of *Harding v. Brooks*, [5 *Pickering's Rep.* 244.] had just been put into his hands by the counsel for the plaintiff. That he had examined the case with care, and found some principles laid down in it, which apparently conflicted with the opinion he had formed, and the cases he had cited. That, although he entertained the highest respect for the decisions which emanated from that tribunal, yet he could not subscribe to their correctness in the case referred to, where they differed from the opinions of this court upon the same subject, especially as no authority was cited by the learned Judge in Massachusetts in support of his positions.]

OAKLEY, J. This was an action of slander, in which the plaintiff obtained a verdict. The defendant now moves for a new trial on two grounds: 1st. That evidence of special damage was admitted, and 2ndly, that the plaintiff was suffered to give evidence of his general good character, when it was not impeached by the defendant.

It appears to be the established rule, that no evidence can be given of any loss or injury sustained by the plaintiff, unless it be specially stated in the declaration, and this, whether the special damage be the gist of the action, or whether the words be actionable in themselves. [1 *Saun.* 243. b. (n. 5.) 2 *Phil. Ev.* 108.] In the present case, proof was given that one of the Insurance Companies in New-York had refused, in consequence of the words spoken by the defendant, to insure a vessel belonging to the plaintiff; and that he thereby sustained a special injury. This proof was not admissible under the pleadings, the averment of

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special damage, being altogether insufficient. It is impossible to say what influence this evidence may have had upon the verdict of the jury.

The plaintiff was also allowed to give evidence of his general good character after the defendant had gone through with his defence, without impeaching it. This also strikes me as inadmissible. The general rule, as laid down in elementary writers, [2 *Phil. Ev.* 107.] is, that the plaintiff cannot give evidence of the fairness of his character until it is attacked. It is presumed to be good, until the attack is made, and the plaintiff must rely on this general presumption, until he is assailed. Such has always been the practice at *nisi prius*, as far as my observation has extended. The defendant may, under the plea of not guilty, assail the general character of the plaintiff, and the latter is bound to be always prepared to repel the assault. But, if the defendant relies on a justification of the charge, by proving the plaintiff's guilt by direct evidence, it would operate as a surprise on him, to permit the plaintiff to repel that evidence by proof of general character.

In the case of *Harding v. Brooks*, [5 *Pick.* 244.] the Supreme Court of Massachusetts have held, that the plaintiff may give evidence of general good character, to repel the proof offered by the defendant under the plea of justification. This case is opposed directly to the conclusion which I have adopted; but I cannot consider it as a controlling authority. The uniform practice in this state, has been otherwise, and I think it the safe and correct rule.

*New trial granted.*

[H. M. Western, *Att'y for the plff.* D. Graham, Jr. *Att'y for the defl.*]

JONATHAN LAWRENCE.

versus

JOHN TITUS, JR., DANIEL Y. TOWNSEND, & RICHARD ELLIS.

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Lawrence.

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end & Ellis

In actions of trespass against an officer and persons acting in his aid ; where the defendants appear by the same attorney, but sever in their defence, and are successful ; the officer is entitled to *double costs*, and each of the lay-defendants, to *single costs* for all items not allowed to the officer.

THIS was an action of trespass, *de bonis asportatis*, brought against the defendants, (one of whom was an officer) for seizing property under an execution against one Charles Lawrence, which the plaintiff claimed as his own.

The defenants severed in their defences, and gave distinct pleas. The officer pleaded not guilty. Each of the other defendants, pleaded not guilty, and gave special notices, that they were plaintiffs in the executions under which the officer acted, &c. Verdict for the defendants.

Their case was submitted to the court for directions to the taxing officer.

*Mr. J. Anthon* for defendants, insisted,

I. That *each* defendant was entitled to double costs : the officer, as expressly protected by the statute and the other two defendants, as acting in his aid.

II. If the lay-defendants are not entitled to double costs, then *they* claim full bills of single costs, and the *officer* claims double costs.

For the defendants were cited the *statute* [1 R. L. 155.] and the case of *Row v. Sherwood*, [6 John. R. 109.]

*Mr. Wm. S. Sears* for the plaintiff *contra* contended.

I. That the attorney for the defendants in this cause was entitled to but *one* retaining fee : the same attorney having appeared for all the defendants.

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II. That the attorney for the defendants is entitled only to single costs, except for the separate plea of the defendant, Ellis; the whole proceedings in the cause having been conducted jointly by the defendants, in the name of the same attorney. He cited, *Wales v. Hart & Dowd*. [2 Cowen, 426.]

The court directed,

I. That the *officer* should be allowed a full bill of costs, *doubled*.

II. That the other defendants should be allowed *single costs*, for all items, *not allowed to the officer*.

[Mr. E. Anthon, *Att'y for the plffs.* Mr. W. S. Sears, *Att'y for the defts.*]

LEWIS K. BRIDGE

versus

THE NIAGARA INSURANCE COMPANY.

Feb. Term,  
1899.

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 v.  
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All losses and expenses necessarily, prudently or reasonably incurred in respect to property saved from shipwreck, from the time of the shipwreck, to the time when the property can be directly transported to the place of its ultimate destination, are proper charges upon the property so transported and are, where the property has been insured, to be borne by the Insurers.

Sums paid for transporting the master and crew, and for their support during the same period, while they are guarding and protecting the property, are also to be borne by the insurers. The master and seamen, after becoming disconnected from the vessel by the shipwreck, are entitled to compensation as *labourers* or *salvors* for their services in transporting and saving the property, to be allowed according to the nature of the services.

Where dollars taken by the master and crew from a stranded vessel, carried on shore and buried in the sand, were afterwards stolen before they could be reclaimed, they were not considered as landed in "good safety" and the loss was held to fall upon the underwriters. But the expenses incurred by the master in searching for the dollars are to be apportioned on the dollars alone.

Where the adjustment of a loss is referred to a referee by a stipulation in a case, the referee is to be satisfied as to the character of the charges in such manner as he may think reasonable; and in case of difficulty, application is to be made to the court for directions.

THIS was a motion to set aside an adjustment of the loss in this case, made by O. H. Hicks, Esquire, to whom the adjustment was referred under a stipulation in the case. [See page 247. *ante*.]

On the trial, the plaintiff did not prove any abandonment, nor the delivery of such preliminary proofs, as showed the defendants with exactness, the amount of the property lost: some part appearing to have been saved. The court had, thereupon, decided, that the defendants were liable only for a *partial* loss and that without interest. On a reference of the testimony to the adjuster, he declared, that he could not state the loss on the testimony at the trial and needed other papers, (which he named) from the plaintiff. The plaintiff furnished these, (objecting however to going out of the testimony on the trial) accompanying the same

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with copies of a letter of abandonment, of all the preliminary proofs rendered, and also of the documents upon which the referee finally adjusted the loss: all which he alleged to have been given before action brought. The property saved, consisted of dollars, gold dust, and doubloons. The crew, after the wrecking, landed at first from their boats, at a desert part of the Musquito Shore, and were obliged to bury the dollars, and proceed south, in search of some place of safety. After a few days, two of the crew gave out, declaring that they could proceed no further, and were abandoned by the rest, who proceeded along the coast, carrying the treasure about their persons, and exposed to extortionate charges from the Indians, for services rendered until they arrived at Corn Island. There a small vessel was procured, and sent for the dollars which had been buried; but on arrival at the place, the dollars were not found, but had been stolen, and probably by the two men who had separated from the rest of the crew. The vessel returned, and the crew proceeded with the gold from Corn Island to St. Juan de Nicaragua, whence the captain took passage, with the treasure in his charge, to New-York, where he arrived with it in safety. He accounted for the balance (deducting the expenses) to the assured, under a consent from the assurers. Among the charges which the captain deducted, were the following:

|                                                                                                                     |          |
|---------------------------------------------------------------------------------------------------------------------|----------|
| Cash paid sundry Natives, from the time we fell in with them on the Musquito Shore, for transporting us, &c.        |          |
| until we arrived in Corn Island                                                                                     | † 710 00 |
| Amount of charter of schooner Sea Gull, to proceed in quest of the specie, &c. buried in the sand per charter party | * 300 00 |
| Paid J. R. for proceeding to Pearl Key Lagoon, and the adjacent coast, in quest of the same                         | * 150 00 |
| Paid for my board in Corn Island                                                                                    | † 49 50  |
| " Passage, myself and crew, from Corn Island to St. Juan de Nicaragua"                                              | † 60 00  |

† Rejected by the referee. \* Allowed.

|                                                                                                                                    |  |          |                              |
|------------------------------------------------------------------------------------------------------------------------------------|--|----------|------------------------------|
| " To crew, to compensate them for their services, transporting the gold from the Mosquito Shore to St. Juan de Nicaragua - - - - - |  | † 355 24 | Feb. Term,<br>1829.          |
| " Captain's expences in St. Juan - - - - -                                                                                         |  | † 16 "   | Bridge                       |
| " " passage from St. Juan to New-York - - - - -                                                                                    |  | † 120 ." | The Niagara<br>Ins. Company. |

On the trial, to a question by the plaintiff's counsel to one of the witnesses, as to what had become of the property saved, the witness answered, that the amount of the cargo received by the plaintiff from the captain, was \$3,661 only. The invoice at the time of shipwreck, was proved on the trial to have been \$10,983. At the trial, Mr. Hicks was produced as a witness by the defendants, and gave in evidence a statement of the loss as made by him. By the report of the referee, the only items allowed out of the above as charges on the insurers were the two items of \$300 and \$150, for going to search for the specie.

The motion now made, was founded upon an affidavit setting forth the delivery in season, (and previously to commencing the action,) of the notice of abandonment, and of the accounts, from which the items and correctness of all the charges on and loss of the shipment appeared. The affidavit also set forth the statement made at the trial by Mr. Hicks, and that it was only referred to him for adjustment, because there was no time for the plaintiff's counsel, to examine the calculations, and that it much exceeded his present report.

An affidavit of Mr. Hicks was read by the defendants, stating, that in his judgment, it was impossible on the testimony contained in the case, to adjust the loss on the principles of a *partial* loss, and that the statement by him produced at the trial, was made on the principles of a *total* loss.

Upon these facts and papers *Mr. Lord* for the plaintiff, contended,

I. That the adjustment must be upon the testimony given at the trial.

† Rejected by the referee.

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Evidence was then given as to the amount saved : if this were imperfect, it should have been then objected to : not being objected to, the parties had a right to go to the Jury on it. Besides, there was an unqualified statement produced by the defendants at the trial, proved by their own witness, upon which we had a right to go to the jury.

If the adjustment *now* made had been produced at the trial, we should have given other evidence. A reference to adjust, supposes an adjustment *on the facts proved at the trial* ; it is not to be supposed that we meant to substitute the referee for a jury, or permit him to inquire into facts not proved at the trial, in any way he might think proper.

By the referee's going out of the testimony at the trial, it happens, that while on the trial and argument, we are turned from a *total loss with interest* to a *partial loss without interest* ; yet on the adjustment, we are met with papers to *reduce* our loss ; the knowledge of which came to the defendants, *by our delivery, before the suit*, and which delivery, if proved, would have given us interest at least, if not a total loss.

II. If, however, the court thinks that the adjustment may be upon other testimony than that at the trial, then the cause ought to be open to both parties, and the plaintiff to be permitted to show the abandonment and delivery of preliminary proofs, entitling him to interest. It now appears, that the defendants, who refused to admit an abandonment, actually made out a statement limiting the recovery against them, as for a total loss : and they have not denied the receipt of the letter of abandonment, or the other papers. They had the statements showing all the items of the loss, of which they deny us the benefit at the trial, and enjoy the benefit themselves on the adjustment.

III. But upon the papers on which the referee acted, he has rejected sundry charges which ought to fall on the assurers, as a diminution of the property saved, and as parcel of the loss. The policy covers the goods from the time of lading until landed 24 hours, "in goodsafety," and all expenses, charges, and losses befall-



ing the property, directly resulting from the perils insured against, are to be borne by the underwriter. [See *Mumford v. Commercial Ins. Co.* 5 John. R. 262. *Jones' arguendo.*] Here the property was not in safety when the crew landed, nor when they proceeded on the deserts of America with the specie about their persons. Their expenses were really *salvage charges*;—expenses accrued in bringing the property to safety, and resulting solely from the disaster. The crew were also entitled to an allowance for their services in transporting the treasure as salvors. [*Two Catharines*, 2 Mason R. 335.] The loss ought to have been settled as a salvage loss. [*Stevens on Average*, 76.]

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*Mr. G. Griffen contra* for the defendants.

I. This is an attempt, after the court have decided that the case is to be settled as a *partial* loss, to turn it into a *total* loss. If the plaintiff is willing to take a new trial, we are willing to have one; but this is not his wish or application, and this is all which the court have the power to do in this respect.

II. It is impossible to adjust the loss on the principles of a *partial* loss, on the testimony at the trial. That merely shows what the plaintiff received from the captain, not what the plaintiff ought to have received and the captain to have paid. The captain was the agent of the plaintiff, there having been no abandonment: and the defendant's liability is not for that, which the captain omitted or refused—perhaps unjustly—to pay to the plaintiff. Besides, an adjustment, (where an attempt to recover on the principles of a *total* loss, ends in a recovery on the principles of a *partial* loss,) must always involve questions of amounts which could not be settled on a trial; which must be shown from other examination and testimony; and in the present case, the plaintiff cannot complain, since the adjustment has been made upon papers delivered by him.

The court cannot refer it to any other person than the referee subject to whose adjustment the verdict was taken.

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III. As to the charges rejected—they were properly rejected by the referee ; they were expenses incurred by the master and crew in getting home, and must have been incurred equally whether they had had the treasure in their hands or not. The sailors were not to have a present of \$355 made to them by the captain at the expense of the insurer. The captain's board and passage home, are also improper charges, and were properly rejected. Besides, there was no evidence before the referee as to the actual disbursement of these sums. Again, the referee has allowed the plaintiff the specie buried ; this was a land plunderage, not a loss by sea perils.

(JONES C. J. That specie was never landed in good safety : it is the same as if it had been sunk in the sea : it was buried in the beach on landing.)

*Mr. Lord* in reply.

As to the charges for the salvage the expense of the crew and captain while transporting the gold, they were charges to which the property became exposed by the shipwreck. Neither principles of humanity nor the circumstances in which the captain and supercargo stood to the crew, as to physical strength, permitted them to prevent the crew from continuing with them and using the gold for the purposes of their common return. The necessities of the crew would have compelled the captain to allow such use of the treasure. Besides, in their numbers there was greater safety, greater probability of transporting the whole property, and it was actually saved by this means. Policy and justice, as well as law, require the allowance of these charges. As to the evidence of them, it is exactly the same as that upon which the referee allowed the expenses for going after the specie ; and as to those expenses they chiefly differ from the rejected charges in, that the latter resulted in the safety of the property, and the former resulted in a disappointment. Those which were fruitless are allowed, those which were successful rejected.

The COURT, after taking time to advise upon this case directed the following order to be entered.

On hearing the report of O. H. Hicks Esquire, the referee in this cause, and the affidavits and documents presented by the parties: and after hearing the counsel of the parties, it is ordered, on motion of *Mr. Lord* for the plaintiff that the said reports with the documents annexed, be referred back to O. H. Hicks Esquire; with these directions of this court in relation to the matters in question.

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That all losses, charges, and expenses necessarily, prudently or reasonably incurred in respect to the property saved, from the time of the shipwreck to the time when the property could be directly transported to its ultimate destination are proper charges, upon the property so transported and ought to be borne by the assurers. That the sums paid for transporting the master and crew, for their support, board, and lodging and passages during the same period, are also proper charges upon the property, and ought to be borne by the assurers. That the master and seamen also, after becoming disconnected from the vessel by the shipwreck are entitled to compensation as labourers, or salvors for their services in transporting and in saving the cargo; to be allowed according to the nature of the services. That the sums for going after the dollars buried as allowed by the referee, were properly allowed and properly apportioned on the dollars, alone. That the loss of the dollars, was rightly allowed against the assurers. That the referee is to be satisfied of the character of the charges, and the payment thereof, in such manner as may be reasonably thought fit by him, and reference may be had to either of the Judges of this court for directions.

[*D. Lord, Atty. for the plff. G. W. Strong, Atty. for the defts.*]

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If a vessel during the prosecution of her voyage be stranded near her port of destination, and, for the purpose of relieving her, the cargo be put into lighters and forwarded to such port, and during the passage in the lighters, a part of it sustain damage, such loss is a proper subject of general average.

A vessel on her voyage from New-York to Mobile, having on board goods belonging to the plaintiff and the defendant, was stranded near Mobile Point. While in this situation, all the goods on board, were put into lighters by the master and forwarded to Mobile, with instructions to his agent, not to deliver them to their respective consignees, until the general average was secured. The goods all arrived at Mobile; but on their passage from the vessel to that place in the lighters, those belonging to the defendant were damaged to an amount exceeding \$2000.

In adjusting the general average at Mobile, the loss on the defendant's goods was taken into the account, and the proportion assessed upon those belonging to the plaintiff amounted to \$86,76. This sum the agent of the captain exacted from the plaintiff's consignee before he would deliver the goods to him, and it was paid accordingly, under that compulsion. The brig was shortly afterwards got off, and proceeded up the bay, but was driven back by a gale of wind and again stranded, when she was abandoned to the underwriters.

Upon an action brought to recover the amount thus paid by the plaintiff to the defendant it was held, that this was a proper case for a *general average*; that the loss upon the defendant's goods was correctly taken into the account, in making the adjustment, and that the plaintiff was not entitled to recover. But if this were not so, it seems that the adjustment made at Mobile would be conclusive, upon the ground that Mobile, in relation to New-York, is to be considered upon a question of average as a *foreign port*.

THIS was an action of assumpsit to recover back a sum of money had and received by the defendant, as the plaintiff's proportion of a general average, for loss by the brig Concord, settled at Mobile in the state of Alabama.

The facts of the case were these. The plaintiff and defendant were both shippers of goods on board the brig Concord from New-York to Mobile. The brig sailed from New-York on the 18th of December, 1824, and on the 11th of January following, after she had received a pilot, and after she had crossed the bar, she ran on shore near Mobile point, with her pilot on board. While the brig continued on shore, the master caused the goods on board to be

put into lighters, and sent up to Mobile, consigned to John Duncan & Co., with directions that they should not be delivered to the various consignees until the general average was secured.

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The goods were put into the lighters in good condition, and on their passage from the brig to Mobile these belonging to the defendant were damaged. The brig remained on shore until the 18th of January when she was got off, and proceeded about eight miles up Mobile bay. Here she was struck by a gale of wind which drove her back upon Dauphin Island where she was condemned by the port wardens and abandoned to the underwriters.

At Mobile a general average was made which included the loss sustained by the defendant ; but did not take the value of the vessel at any time into computation ; as the average was made up, after she was abandoned to the underwriters. The amount of the defendant's loss by the damage to his goods in the lighter was \$2,079.17., and the amount of contribution charged on the plaintiff's goods for the loss was \$86.76. This sum the plaintiff's consignee was compelled to pay to the agent of the captain before he could obtain his goods, and the agent paid the same sum over to the defendant at Mobile.

The plaintiff now claimed to recover the amount so paid or the principal part of it, back again in this action, and a verdict had been taken in his favour subject to the opinion of the court upon a case made. There were two statements of average exhibited in the case, one being that made at Mobile according to the custom there, and the other purporting to be made according to the practice in the city of New-York, and the two computations differed from each other very materially. By the latter, the plaintiff's goods were charged with but sixteen dollars and 77 cents, the damage to the defendant's property in the lighter being wholly omitted. In other particulars the two statements corresponded with each other.

*Mr. A. McDonald and Mr. D. B. Ogden* for the plaintiff contended.

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I. That the adjustment of general average made at Mobile was not conclusive upon the parties, and could not aid the defendant, in his attempt to withhold money unlawfully obtained from the plaintiff. The adjustment of general average in order to be conclusive, must be made according to the laws of the state in which the contract was made. [*Lenox v. United Insurance Company*, 3 John. Cas. 178. *Marshall on Insurance*, (2d ed.) §19. 727. *Park on Insurance* 20.]

In this case the contract of affreightment, and all the contracts of insurance were entered into in this state, and the adjustment of average as made at Mobile differs materially from an adjustment founded upon the practice among merchants and underwriters in New-York. The plaintiff has a right therefore to open the adjustment and recover back the money with which he is improperly charged.

II. The goods of the defendant, damaged on board the lighters, going from the brig to Mobile, were not a subject of general average, and should not have been taken into the account.

It is a well settled rule of average, that where a part of a ship or its cargo is voluntarily sacrificed to preserve the residue from some impending danger, the part saved must contribute to its loss. So also if to lighten a vessel when she is aground, or to enable her to pass over a bar, or shoal, a part of the cargo is placed in lighters, and in consequence, it is lost, the property saved contributes to such loss. [*Phil. on In.* 334. and the authorities there cited. 2 *Searg. and Rawle*, 337. 8.]

So the rule is equally well settled, that a general average contribution can only be claimed when the sacrifice was absolutely necessary for the preservation of the ship and cargo. [*Marsh. on In.* 462. (1 *Amer. Ed.*) 537. *Lond. Ed.*] A loss which does not evidently conduce to the preservation of the ship and cargo is not a proper ground of average and contribution. [*Marsh.* 463.]

Again, it must appear that the ship and the rest of the cargo were saved; for if the goods be thrown overboard in a storm, and the ship afterwards perish, there shall be no contribution of the goods saved, (if any,) because the object was not obtained. [*Marsh.* 463. 537. 8.] If the lighters be lost, the ship and cargo shall

contribute. But if the ship be lost, and the lighters saved, then the goods in the lighters shall not contribute. [*Marsh.* 463. 6 *Mass. Rep.* 125.] In this last case, a part of the property in the lighter was thrown overboard for the preservation of the residue in the lighter; and it was held, that the part saved in the lighter, as well as the residue saved in the ship, were not subject to general average on account of such loss.

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By an examination of the authorities, it will be perceived, that the case before the court is destitute of every fact and circumstance requisite to constitute a general average; and a loss is never to be apportioned on that principle, unless it was one which was voluntarily incurred for the common benefit of the ship, cargo, and freight. The foundation of general average is always laid in a voluntary sacrifice of a part for the sake of the rest, and here there was no such voluntary sacrifice. The adjustment of the loss upon the principle of a general average, was a mistake, and was unjust towards the owners of the residue of the cargo, the ship, and the freight.

If this was a case for general average, it must have been so upon the ground, that the ship was saved at the time, by depositing the goods in the lighters, for if the ship be not saved, there can be no general average. If this be so, if the vessel was saved by the exposure of the goods, then her value should have been brought into the computation, and she should have contributed. The average was not, then, made up correctly upon any principle, and the fact of omitting the vessel in the computation, proves that the case was not one for general average.

In this case, the goods were not put into the lighters for the common benefit of all, to save ship, cargo, and freight, but that expedient was resorted to to save the goods themselves, without reference to the ship. But if they were exposed for the common benefit, then the object was not attained; for the ship was lost, and there can be no general average.

III. The plaintiff having been compelled to pay the amount as adjusted, in order to get possession of his goods, may recover the money back in an action of assumpsit. [1 *T. R.* 286. *Coup.*

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365. 4 *Mass. R.* 378. 9 *John. R.* 201. 270. 1, *Taunt.* 359.] As the consignee was prohibited from delivering the goods until the average was adjusted and paid, and as the payment was made by the owner at Mobile, to obtain possession of his goods, it must be deemed a payment by compulsion, and being wrongfully exacted, the amount so exacted can be recovered in this action.

*Mr. J. Anthon, contra* for the defendant, contended,

I. That the goods of the defendant having been damaged in the lighter, in an attempt to relieve the ship while stranded, the loss was a fair subject of average contribution. [*Stephens on Average*, p. 8. 15. and the authorities there cited. *Phil. on In.* 334.] It is a principle of common justice, as well as of commercial law, that if part of a cargo of a vessel which is aground, be put into boats for the purpose of floating the ship, and such part be lost, it must be made good by contribution. We admit that the sacrifice or exposure must be a voluntary one, and for the common benefit of the ship, cargo, and freight; and in this case, the goods were, beyond all doubt, put into the lighters for the common benefit of ship, cargo, and freight; for until the vessel was lightened, she could not be removed from her perilous situation, and both ship and cargo were in imminent danger of being wholly lost. It was therefore for the common benefit of all that the ship should be lightened, and if she had not been in a situation which enabled the master to forward the goods to Mobile, they must have been thrown overboard, or a part of them at least, for the preservation of the residue, and the vessel. The goods were therefore voluntarily exposed to a new peril for the common benefit of all, and were damaged while exposed, and the average was made up upon correct principles at Mobile.

If it be a principle of general average, that the ship must be saved by the exposure of the cargo for her benefit, then the facts bring this case within that principle; for the vessel, after her cargo was taken out, was removed from the place where she was aground, and proceeded on her voyage up the Bay. She was completely relieved from the peril which existed at the time the



goods were put into the lighters, and thus far the purposes for which the cargo was exposed were entirely answered.

True it is, the vessel was afterwards totally lost, but that was by a new and distinct peril, having no connection with the first danger. After having been removed from the place where she was stranded, and while on her passage to the port of destination, she was met by a gale of wind, and driven upon Dauphin Island. But that can make no difference in the principle upon which the average was adjusted, for the vessel was saved from her first peril by the exposure of the goods in the first instance.

The objection to the average arising from the fact that the vessel was not taken into the account, is without foundation; for at the time the average was made, the vessel was wholly lost, and was abandoned to the underwriters. Contribution is made by the property saved, and if the vessel was lost at the time of the computation, she of course could not be taken into the account.

II. The average having been settled and paid in a foreign port, is conclusive: [11 *John. R.* 323. 5 *Coven's Rep.* 63.] and any port out of this state is to be considered as a foreign port, within the meaning of these decisions. "It is the duty of the master, in cases proper for a general average, to cause an adjustment to be made upon his arrival at the port of destination, and he has a lien upon the cargo, to enforce the payment of the contribution." [3 *Kent's Com.* 195. and the cases there cited.\*]

*Mr. Ogden*, in reply to this last point, observed, that the rule laid down related to cases of assurer and assured: to cases between contracting parties, and had nothing to do with the rights of third persons. Where the average adjusted is really the proper subject of general average, then the foreign settlement of the amount is conclusive. But it never has been held, that foreign tribunals are to settle conclusively what the proper subjects of

\* See also *Dalglish v. Davidson*, 5 *Dow. and Ry.* p. 6. 2 *Barn. and Cr.* 304. and 4 *D. and R.* 375.

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average are ; and if it had been, the ports of neighbouring states are not to be deemed foreign ports.

JONES, C. J. The leading questions in this cause are, whether the damage to the defendant's goods in the lighter, was an item chargeable upon the cargo for general average, and whether the adjustment of the average at Mobile is conclusive.

It appears that the brig, on her voyage to Mobile, and after she had taken a pilot to conduct her in, and had crossed the bar, ran on shore near Mobile Point, and for the purpose of lightening her, so as to put her afloat, the master caused the whole cargo to be taken out of her, and put into smaller vessels and lighters, and sent on to Mobile, the port of destination ; and the expenses attending that transportation from the brig to the port, is one of the subjects of the general average, to which the cargo was made to contribute. Of that charge, no complaint is made. But the goods of the defendant, who was a principal shipper, received damage while in the lighters, and were sold by him at auction, for the purpose of ascertaining the amount of the loss ; and that loss was also brought into the general average, and is the objectionable item.

The interests which were made contributory, were the freight for the whole amount, and the cargo at the invoice value. But the brig, after she was afloat, and in proceeding up the bay, encountered a storm, by which she was wrecked and lost. No part of the average is charged upon her. The plaintiff, who was one of the shippers, was compelled to pay the contribution assessed upon his shipment, before he could obtain his goods, and has brought this action to recover back the sum he was thus coerced to pay, as having been wrongfully extorted from him.

It is conceded, that the voluntary and deliberate sacrifice or exposure of goods to relieve and rescue the ship and cargo from present jeopardy or impending peril, when the safety of the whole is effected by the act, entitles the owner of the property sacrificed or exposed, to a rateable contribution from those who are benefited by the result. But it is contended, that in this case, the damage to the defendant's goods in the lighter, was not the immediate

and direct consequence of the exposure for the general safety, but is to be ascribed to the subsequent perils of the navigation in the lighter, and therefore too remotely connected with the lightening of the brig, to be a just subject of contribution; and it is further objected, that the object of the exposure, the safety of the brig, was not effected; and on that ground the claim to a general contribution was untenable.

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It is a settled rule of the Marine law, that if goods be put into boats or lighters to float the ship when aground, and the boat be lost, it shall be regarded as a jettison, and the remaining property must contribute to the loss, because the lightening of the ship was a voluntary and deliberate act, and done for the benefit of the whole. [*Steph. on average. p. 15 and authorities there cited.*] And if the total and entire loss of the goods in the lighter, entitles the owner to contribution, his claim to recompense, for the damage they sustain in that exposed condition, must have an equal title to respect.

It can make no difference that the stranding was at the entrance of the port of destination, and that the goods were sent in the lighters from the ship to the port. She was upon her voyage and in imminent danger of being lost; the only expedient that remained for her safety, and the safety of the cargo was to lighten her by unlading her; the change of the cargo from the ship to the boat became indispensable; that was the service rendered by the exposure of the goods, and if it accomplished the purpose intended, the loss incurred by the goods in accomplishing it, ought to be borne by all who participated in the benefit. The distinction is between the case of a stranding, which exposes the vessel to the imminent danger of shipwreck, and the voluntary removal of the goods from her by the master, to boats or lighters for the purpose of averting the peril and rescuing the whole ship and cargo from jeopardy, and the case where the vessel is lightened for the purpose of floating her, when she casually strands, and where the operation is in the ordinary course of the voyage for the purpose of discharging part of the cargo on the outside of the bar, because the ship draws too much water to cross it with a full loading on board. A loss or damage in the lighter employed in

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the latter case in so discharging or lightening the ship for the purpose of enabling her to cross the bar, *must be borne by the owners*, and would not be a subject of general average, because it is not an operation for the relief of the ship and cargo from any impending peril; and in the first class of cases where the danger of shipwreck impends, it is because the goods are taken out for the purpose of floating the ship when stranded, and thus delivering both ship and cargo from their perilous situation, that the loss or damage to the goods in the lighter in such case is a subject of contribution.

Marshall in his treatise, refers to 1 *Mag.* 56., and *Malynes* 109 & 10, to show that according to their exposition of the Marine law, if the ship upon her arrival at the mouth of a river or harbor, be found too deeply laden to get over a bar, or to sail up, and the master to lighten her puts part of her cargo into lighters and those lighters are lost, the owners of the ship and the remaining goods shall contribute to the loss because the removal of part of the cargo from the ship to the lighters was for the general benefit. But an exception is stated by Pothier to the rule which is that goods removed from the ship to enable her to enter her port of destination and lost in lighters, are not the subject of average contribution; and the exception seems reasonable, for he correctly imputes it as a fault to the master who ought to know the capacity of the port to which he is bound, and not load his ship too heavily, and thereby induce the necessity of lightening her. But this exception affirms the rule, and shows that losses or damage to goods taken from the hold of the ship, and exposed in lighters for the purpose of floating a ship which has grounded by accident, is a legitimate subject of contribution.

The case of *Whitridge v. Norris*, [6 *Mass.* 125.] is not in hostility with these principles. The point upon which it turned, was the absence of all intent to aid or benefit the ship or the residue of the cargo by the removal of the keg of dollars which was lost, from the ship into the boat. In that case the ship when under the charge of a pilot in Bengal bay, struck the ground and was thought to be in imminent danger of perishing. The master and crew impelled by their fears for their own safety, and acting by the advice of the pilot took to the boats and forsook the ship,

they attempted to save some of the lading, and put part of the kegs and bags of specie in the long boat, but finding her overloaded, and the sea running high, were obliged to throw most of the goods overboard for the preservation of their lives and to keep her free until they could reach the shore. The ship, however, survived the disaster, but the claim to an average contribution, was resisted and overruled on the ground that the master and crew in taking to the boats with the specie, acted with no intent or purpose directed to the preservation of the ship, which was considered as lost, deserted in despair and left to her fate; and that the exposure in the boats, though an extraordinary peril was unforeseen and the danger not voluntarily incurred with any view to the common benefit, and did not contribute to the eventual safety of the ship and cargo, which were in no degree the result of the dereliction of the vessel by the crew. And it was held that the goods saved in the long boat by the jettison from it, were not liable to contribute to the loss of the specie because they were thus exposed together in consequence of a previous peril, and for the sole purpose of saving what could be saved without any concert of the parties interested or common benefit intended. That the intention of the jettison was the safety and preservation of the lives of the passengers and crew of the boat, and that the loss of the specie thrown overboard was incurred in the attempt to save it from the peril of shipwreck in the ship, and without any regard to the ultimate safety of the ship or the other effects taken with it, for the same purpose into the long boat, and therefore formed no case for contribution or damage. But the Judge who delivered the opinion of the court, fully admitted the principle that any loss or exposure voluntarily incurred in the preservation of the vessel and her lading, and with that view, is to be borne by those who partake of the common benefit conferred by contribution in general average; and that goods exposed in a boat from which they are lost came within the principle.

That case then instead of militating against the defendant, so far as it has a bearing upon the point is favorable to him. The case of *Grey and others v. Waln*, [2 Sergt. & Rawle. 239.,] decided that a vessel lost by voluntary stranding to avoid capture, was to be paid for by contribution in general average.

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The Supreme Court of this state, however, in the case of *Bradhurst and Field v. The Col. Ins. Co.* [9 John. 9.] in reference to the circumstances of that case, held, that where the vessel is lost by voluntary stranding, the rescued cargo, though saved by her sacrifice, is not to be burdened with contribution for her loss. It is not now necessary to examine how far the two cases are in conflict, or may be reconciled; for the Supreme Court of this state in their decisions admit, that when the ship is voluntarily run ashore for the safety of the adventure, and is afterwards floated and resumes her voyage, the damage resulting from the sacrifice is to be borne as general average. It is a general principle which runs through all the cases, and has the sanction of all the courts, that the sacrifice made by the common agent of the whole or a part of the goods of some of the shippers, for the rescue of the whole interest from a peril which threatens the destruction of all, entitles the sufferers to contribution to the loss from those who benefit by the sacrifice thus made for the common welfare. And any private loss or damage which falls within that principle, and is purposely incurred for the general safety, is entitled to the benefit of the rule of contribution wherever the parties called upon to contribute have profited by the sacrifice.

On the same principle, where a ship having sprung a leak, a part of the cargo was taken out to lighten her, and to discover and stop the leak, which was put on board of another vessel, and lost by capture; but the leak in the first ship was repaired, and she enabled to proceed on her voyage, and finally reached her port of destination. The goods lost by the capture were contributed for in general average. [1 Mag. 160.] So in *Magrath v. Church*, [1 Cains, 214.] where in cutting away a mast, it splintered between the partners, and made an opening which let the water into the hold, and damaged the cargo, the damage was held a subject of average. But the right to retribution, and the obligation to contribute must concur to render the claim of the sufferer complete. He whose property is saved by the loss of the property of another intentionally sacrificed for that purpose by a common agent, is bound by every

moral as well as legal obligation to contribute to a just average indemnity for that loss which was incurred for his benefit, and has enured to his advantage. But no obligation results from a loss or exposure which conduces to another's benefit, but was not designed or intended to subserve the general interest by averting a common danger. Nor can a party be required to requite a benefit which was intended to be conferred, but which has been disappointed by the result. If these be the principles of the rule of contribution, this case, assuming the sacrifice to have been successful, must come within it; for the damage to the defendant's goods was the consequence of the removal of them from the brig to the lighter, which was the act of the master as the common agent for the preservation of the vessel and cargo from the greater and more imminent peril which impended from the stranding of the brig.

Then, did the transfer of the goods from the brig to the lighters, in which they received the damage, occasioned by the exposure, effect the rescue of the vessel and cargo from the peril it was designed to avert? The master testifies to the fact, that the brig went on shore at Mobile Point, on the 11th, and continued aground until the 18th of the month of January; that the cargo was taken out to lighten her; that after she was unloaded she floated, and that he, on the 19th of the month, endeavoured to take her up to Mobile; but after proceeding about eight miles up the bay, she was driven back by a gale, and struck on Dauphin Island, where she was condemned by the wardens of the port and abandoned. The vessel and cargo were relieved, therefore, from the peril they were in by the stranding at Mobile Point, and the cargo reached its destination, but the brig was eventually lost by a new peril. That loss, however, happening after the peril was over which had first put the vessel and cargo in jeopardy, and not being voluntarily incurred for the benefit of the cargo, nor conducing to its safety, was not made the subject of an average contribution. But the damage to the defendant's goods resulting from the exposure of them, to relieve the vessel and cargo from the first peril, and from which they were effectually rescued, was brought into average: and the plaintiff now in-

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sists that he was not liable to contribution for that loss, because the ship afterwards perished before the voyage was ended.

It is conceded to be a general rule, that contribution is not due for a jettison, or for damage from the exposure of part of the cargo, unless the ship and remaining cargo have been rescued from the peril to which they were exposed; but it is a mistake to suppose that the ship must pursue her voyage, or arrive at some port in safety, to entitle the party whose goods have been sacrificed to contribution for the loss. If indeed the ship, after the jettison, perishes in the same storm, the rule applies, and there shall be no contribution for the goods that may be saved to the owners of those that were thrown overboard, because the object of the sacrifice, which was the safety of the ship from the storm, was not attained. But if the ship escape the peril which the jettison was intended to eschew, and is afterwards lost by another accident or disaster, the effects saved from the last disaster shall contribute to the loss or damage incurred in averting the first peril, because that sacrifice once saved them from danger. [*Marshall*, 537.]

Phillips states the rule to be, that if the impending peril, on account of which the jettison is made, is averted, what is finally saved must contribute to the loss; but being for the common safety, contribution is to be made only as far as the common safety is secured. [*Phillips*, 342.] Pothier, treating on this point, assumes as the settled rule, that a loss occasioned by jettison, or a sale of part of the cargo at an intermediate port, to enable the ship to proceed on the voyage, is a subject of restitution, whether the ship afterwards arrives at the port of destination, or is disabled by a new accident from proceeding, and discharges at a port of necessity. He holds, that the estimate of the indemnity should be the price of merchandize of the same quality with those that were sacrificed at the place of the ship's discharge, where the contribution is to be regulated, and that such place of discharge is either the port of destination, when she arrives there, or the port at which she is obliged to discharge, when by a new accident happening after the jettison, she has been so disabled as to be unable to proceed further, or pursue the residue of the voyage. [2 *Poth.* 414. 128.] And Stevens, in his *Treatise on Average*, collects a similar rule from the writers on mari-



time law. He explicitly states the principle to be, that if on the jettison being made, the ship survives the storm, and continues on the voyage, but shall be afterwards wrecked; what is saved from such wreck must contribute to make good the jettison. [*Stevens*, 14. and the books there cited.]

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These opinions of foreign writers on maritime law, are of great weight and approved authority, and their doctrines on subjects of such general concernment, are consulted by jurists, and not unfrequently form rules of law in our own courts, and govern our judicial decisions. I have found no adjudication either in England or in this state, impairing or drawing in question the principles of average contribution, to which I have adverted as deducible from them; but the opinions of our own jurists, so far as they have been expressed, confirm and apply them. The rule of salvage in the case of the wreck of the ship off the port of destination, where the cargo is saved and delivered to the consignees, conforms to those principles; for in such case the freight is made to contribute to the expense of saving the goods. Lord KAIM selects that rule as an example to illustrate one of his maxims of equity. The proprietor of the goods, and the owner of the ship, he observes, are in such cases connected by a common interest; the recovery of the goods from the shipwreck was beneficial to both parties; to the freighter, because it restored to him his goods, and to the owner of the ship, because it gave him a claim for freight: and for that reason the salvage ought to be paid by both in proportion to the benefit received. [*Kaim's Pr. of Eq. B. 1. p. 1. C. III. sec. 2. art. 2.*]

In the case of *Heyliger v. New-York Firemen Insurance Company*, [11 *John*. 85.] the schooner success bound to the port of New-York, being on shore near the entrance of the port and in a perilous situation, it was agreed between the consignees and agent of the owners of the vessel and cargo and the insurers of those interests, that immediate means should be taken to save the vessel and cargo if practicable, and in case the vessel was lost, to bring the cargo to New-York, and that the measures so taken should be without prejudice to the right of either party; the vessel was wrecked and totally lost, but the cargo was saved and brought up in lighters to New-York, and delivered free of damage

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to the consignees who paid the charges and then called on the defendants as insurers on cargo to contribute their proportional part of the expense as general average ; they repelled the claim, insisting that the expense of the lighterage and forwarding the cargo to its place of destination was a charge upon the ship-owners solely, and payable out of the freight which they were enabled thereby to earn ; but the court adjudged the claim to be just and legal, the materials of the ship, the freight and the cargo were made to contribute to the charge on the principles of general average.

In strictness, that was a case of salvage and not *eo nomine* an average loss ; the stranding was a disaster which befel the ship from accident, and was not an act of volition, nor was there any sacrifice or exposure of any portion of the common adventure entrusted to the charge and management of the master, for the common safety or benefit of all the interests in jeopardy. But in its leading features and practical results it was very analogous to that species of general average which is now before us, and the reasonable and just rules applicable to average contribution were applied to it by the court ; and if the expenses incurred in saving the cargo from the wreck, when the stranding was not a sacrifice for the general safety and the vessel was totally lost, were a legitimate charge upon that cargo in common with the freight and the materials of the wreck, on the principle of a joint and common benefit conferred by those expenditures upon the whole, surely the expenses and damages resulting from the removal of goods from the vessel to lighters, and the greater exposure of the goods in the lighters for the purpose of rescuing the vessel and cargo from peril, must have as strong a claim to contribution from the cargo and freight which participated so largely in the benefit of that removal and exposure of the goods that were damaged.

In that case stress was laid upon the agreement of the parties, to attempt the deliverance of the vessel and cargo from the perils that surrounded them, which was relied upon by the counsel as constituting a *casus fœderis* which distinguished it from the common case of the transportation of the goods from the wreck to the port of destination in a substituted vessel and gave it the impress of a case of average and contribution ; and the reasoning of the court is based upon that distinction.

In the case before us, the implied consent and agreement arising out of the contract of affreightment, and which is the foundation of the law of average contribution, made a *casus federis* of equal obligation upon the parties, and required that in the event of a common danger, averted by the timely and voluntary sacrifice or exposure of any portion of the property in jeopardy, for the safety of all those who should participate in the benefit, should contribute to the indemnity of those who should suffer in effecting the rescue and safety of the whole from the peril. It would be strange that this right of the sufferer to indemnity, which on the success of the effort to save the adventure from the peril, had become perfect, should be divested, and the parties who reaped the fruit of the sacrifice discharged from the obligation to indemnify, by the subsequent loss of the ship by a new disaster. The right to contribution cannot depend on the arrival of the ship at the port of destination, any more than it can upon the delivery of the cargo saved from the peril by the sacrifice, to the consignees. If the ship or any portion of the cargo be lost by a new accident, the owners of what was so lost cannot be made contributory in respect of it, to the indemnity of those who suffered by the sacrifice for the safety of those goods from the previous peril.

But the exception does not extend beyond the vessel or goods so lost by the subsequent peril, all the property which is saved from that peril and ultimately comes to the use of the proprietors, continues liable to its just contribution in general average to the loss incurred, or its rescue from its first jeopardy. I can discover no principle therefore which could entitle the plaintiff to recover back any part of the average contribution he has paid, even if his claim could be viewed as an open question, the disputed item of damages to the goods in the lighters, in the views I have taken of it, would by our own laws, be an average loss, and the rules applied in adjusting the average at Mobile were not in collision with our own.

But I do not consider the point as an open question. The adjustment made at Mobile is in my opinion conclusive. The case of *Lenox v. The United Insurance Company*, [3 Johns. Cases, 178.] was relied upon as showing that a foreign adjustment of an average loss is not conclusive upon the parties. That was the

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case of a jettison of cargo laden on deck, which had been brought into general average by a foreign adjustment at Lisbon, and the general average paid by the assured, who claimed an indemnity for it from the insurers. The question was whether the sum paid in general average for the goods on deck was recoverable. The court decided that it was not, and held that the adjustment at Lisbon did not conclude the parties. The reason they gave for the opinion was that the parties to the contract of insurance must be considered as having in view the law of this state, and must be governed by it. But is that reason satisfactory? The grounds upon which the foreign adjustment is held conclusive are that it is the duty of the master to cause the adjustment to be made, and to see to the settlement of the averages: and that the parties are compellable to submit to the assessments upon them that may be coerced by suit or by the detention of the goods to pay the contributions as settled there, and if the adjustment could be opened at the home port and a new rule of apportionment be applied, great and manifest injustice must often be done to some of the parties without any remedy for the wrong done them by the derangement.

But I consider that part of the case as overruled by subsequent decisions. In the case of *Strong & Havens v. The N. Y. Firemen Ins. Co.* [11 John. 323.] the cargo was estimated in the adjustment of the average at the market price in Lisbon, the port of destination, where the contribution was settled, which not being conformable to the rule of adjustment in this state, as established by the case of *Leavenworth v. Delafield*, [1 Cains, 573.] the defendants insisted that they were not bound by the adjustment at Lisbon, and were liable only for the proportion of general average, to be settled according to the rules adopted here. But the court, after reviewing all the cases, held the adjustment to be conclusive, on the ground that a settlement of the general average at the foreign port, when fairly made according to the laws of the country to which the port belongs, is binding upon the parties, and that it is the duty of the master to cause an adjustment to be made on his arrival at the port of destination, and to enforce the payment of the contribution, and that he has a lien upon the cargo for its proportion.

I cannot distinguish this case from that. The master here refused to deliver the cargo until the average contributions were satisfied. There is no pretence that the average was not fairly settled according to the laws and usages which prevail at Mobile, the intendment is, that it was, and it must, I think, be, binding upon all the shippers.

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The court, in the case last cited, do not, it is true, in terms overrule the decision in *Lenox v. The United Ins. Co.*; but they do not give it their sanction. The only notice taken of it by the learned and able Judge who gave the opinion of the court, is, that the decision there was against the recovery of the general average, on the ground that the jettison could not by our law be brought into an average loss, but that the effect of the adjustment, if the jettison had, according to the laws of this country, been a proper item in making it up, is not determined. This was indeed a nice shade of difference. In the case in which that decision was reviewed, the adjustment was not conformable to the rule judicially established in this state for the adjustment of average contributions. And it is difficult to perceive a reason for distinguishing between a foreign adjustment which deviates from our laws, in the estimate of the subjects properly made contributory, and one which includes indemnities for subjects that our laws would reject. Each operates to impose charges upon the parties to which they would not be liable on an adjustment of the average in this country, and the principles on which the court place the last decision, equally require that the foreign adjustment should in both cases be conclusive. But the two modern cases of *Newman v. Cazalet*, and *Walpole v. Ever*, to which the Judge refers, as upholding his principles, were upon foreign adjustments, which embraced subjects excluded by the English rules. In the first case, which was an adjustment by the Consular Court of Pisa, several items were charged, which, according to the English usage, would not have been allowed. And in the other case, the holders of a respondentia bond had been compelled to contribute to the average loss; and Lord KENYON held the underwriters bound for the amount of the contribution, notwithstanding that by the laws of England, the lender on respondentia is not lia-

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ble to average losses. Those cases, so irreconcilable with the distinction between objectionable subjects brought into foreign averages and exceptionable rules for the adjustment of the contributions to legitimate subjects of average loss, are cited by the learned Judge as illustrating and confirming his sense of the principle that foreign adjustments, when fairly made, are conclusive; and he understands that to be the rule to which the courts of this state are to conform: we must take the rule, he observes, as we find it, and leave any amelioration of which it may admit to another department of the government.

The case of *Depau v. The Ocean Ins. Co.* [5 Cowen, 63.] fully confirms that construction of the rule. In that case, the previous case of *Strong v. The N. Y. Firemen Ins. Co.* was cited by the court as deciding that, when a general average is fairly settled in a foreign port, and the insured is obliged to pay his proportion of it, he may recover the amount from the insurers, though the average may have been settled differently abroad from what it would have been at the home port. And on the authority of that case, the court held that the averages then in question, which had been settled at Rotterdam, the port of destination, must govern. One of the objections to those adjustments was, that certain cables procured at Halifax, a port of necessity, in the course of the voyage, and which were not chargeable as an average loss, were improperly brought into the average and allowed: yet the court held, that the adjustment could not be opened for that cause, but must govern. In that case too, a distinction was suggested between adjustment at the port of destination, and at a port of necessity, and it was contended by counsel that an adjustment at the port of necessity being indispensable, would conclude the parties, but if made at the port of destination, was not conclusive, unless shown to be called for and made compulsory upon the master; but the distinction was disregarded by the court. Must not that case govern this? The adjustment in this case was made at the port of destination, but which, for all the purposes of this average was a port of necessity, for the loss occurred at that port, and was there adjusted. And if the damage to the defendant's goods would have been disallowed on the settlement

of the average here, yet the allowance of it there can no more be made the ground for opening this adjustment, than the allowance for the cables in the case of *Depau* could upon the adjustment in that case.

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The cases I have cited were between the merchant and the insurers, but the same rule applies to the relation of ship-owner and freighter. In the case of *Leavenworth v. Delafeld*, where the court establish rules for themselves for the valuation of the different interests to be brought into average and made contributory to the loss, they apply them to the original owners of those interests, and conclude with the direction that the same course of adjustment must be pursued between underwriters; showing the opinion of the court that the same rules and principles are applicable to adjustment between the ship-owner and shipper as between the merchant and insurer; and in the case of *Walden v. Le Roy*, [2 *Caines* 263.] the court held that the person entitled to contribution may recover from the person liable to contribute, and he from his insurer. In most cases of foreign adjustment, the averages are from necessity settled and paid by the parties who are to contribute, without reference to the question of insurance. It would be against the principle and true spirit of the rule to allow the contributory parties who are uninsured to open the adjustment, and to hold it conclusive upon those whose interests are insured, and upon their underwriters. There can be no solid ground for the distinction: the adjustment must be equally conclusive upon all the persons and interests actually brought into the settlement of the average.

OAKLEY J., after stating the facts.

The first point to be determined is, whether this is a case for general average at all.

The principle upon which a general average depends is well established. When expenses are incurred or sacrifices made voluntarily, on account of ship, freight and cargo, and with a view to the common safety of all, a general contribution must take place provided the purpose for which the expense was incurred or the sacrifice made is answered. [*Phil. on Insurance*, 331. 334. *Con. Marsh.* 536-7.] In the present case, the vessel, freight and cargo

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were exposed to a common peril ; all were relieved from the impending danger by the shipping of the cargo on board the lighters and its transportation to Mobile. The goods were saved, the freight earned, and the vessel put afloat in safety, and on her way to her port of destination uninjured. She was subsequently lost by a new peril in no way connected with the first stranding. This cannot affect the question of general average as to the expense or loss incurred in consequence of the first peril. That was ended and the purpose for which the sacrifice was made was fully aswered. [*Phil. 342. 343. and the cases there cited, Con. Mar. 537.*] This case then seems to be clearly within the general principle above stated. I have not deemed it necessary to enter into an examination of the question whether the adjustment of the general average at Mobile is conclusive upon the parties in this cause ; because I am satisfied that it was in fact made upon principles sanctioned by the law of this state and that the damage sustained by the defendant's goods while on board the lighters was properly taken into the estimation of loss.

In *Con. Marsh. 538*, it is laid down, that if a ship, upon her arrival at the mouth of a river or harbour, be found too deeply laden to get over a bar, or to sail up, and the captain, to lighten her, put part of her cargo into lighters, and those lighters are lost, the owner of the ship and the other parts of the cargo shall contribute. This appears a reasonable doctrine. The loss happened directly in consequence of the act resorted to for the general benefit and safety. In the present case, if the lighters, on board of which the goods were shipped, had remained with the stranded vessel, and had been lost, or if the goods of the defendant, in the act of being put on board the lighters, had been by accident dropped into the sea and lost, or partially injured, there can be no question, that within the principle above stated, it would have formed a subject of general average. It is not perceived that the transporting of the goods to Mobile, and their sustaining a partial injury only on their way thither, can make any difference in the application of the rule. Shipping the cargo on board of other vessels, and sending it to the port of destination, then near at hand, was one entire act, resulting from the original design to re-



lieve the ship from her perilous situation. The vessel was not abandoned, but in part preserved from the danger to which she was exposed, and afterwards actually proceeded towards her destined port. The vessel, freight and cargo all derived security from the exposure of the defendant's goods in the lighters. The purpose for which such exposure was made, was fully answered; and I see no reason why they should not all contribute to indemnify the defendant for any loss, which was the direct consequence of such exposure.

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The case of *Whitteridge v. Norris*, [6 Mass. 182.] which was considered on the argument as analagous to the present, differs from it in the material fact, that in that case the vessel was abandoned by her crew while viewed as a wreck. The property taken into the boat in which they escaped, was not put there with the intent to contribute to the safety of the vessel, or the remaining cargo; and though the vessel was afterwards saved, the court held there should be no contribution, on the ground, that the property lost was not exposed to hazard with any view to the preservation of the ship; nor did such exposure in any manner contribute to such preservation. I am of opinion that the defendant is entitled to judgment.

*Judgment for the defendant.*

[A. L. McDonald, *Att'y for the plff.* E. Anthon, *Att'y for the defts.*]

*Note.*—Mr. Benecke, in his "Principles of Indemnity in Marine Insurance," has treated this subject with much learning, in his fifth and seventh chapters. He seems to qualify the rule, "that the loss occasioned by jettison is to be borne by the whole, only in those cases where the preservation intended has actually been accomplished." He says, (p. 180.) "If nothing be saved, the owner of the goods thrown overboard can have no claim upon the owner of the other goods lost; because he loses nothing by the jettison, but what would also have been lost without it, since his goods, had they remained in the ship, would have shared the fate of the rest. But if *some* goods be saved, the proprietor of the *sacrificed* goods is entitled to a compensation." This proposition, he says, is confirmed by the opinion of *Weijtsen*, who expresses himself in the following manner: (§ 33.) "If

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"a vessel should be in danger, and after goods have been sacrificed in order to lighten her, should nevertheless be wrecked, the goods saved or fished up must contribute for the jettison, because it has been resorted to with a view to save the ship and the rest of the goods, and because if those goods had not been sacrificed, their owner might have saved or recovered them all, or in part, as the other owners have done, but of which possibility he was deprived by the jettison." Again. (p. 209.) "When a part of the cargo is shipped over into lighters, or the long boat, in order to extricate the ship and cargo from a perilous situation, as for instance, to set a *stranded vessel afloat*, or to lighten a leaky one, and bring her into harbour, the charges of such a measure, as well as the *damage sustained by the goods in consequence of it*, undoubtedly belong to general average." [See also *Kent's Com. vol. III. p. 185 to 196.*]

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CHRISTOPHER M. MELLEN AND JAMES NESMETH

*versus*

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It is well settled, that the *charterer* of a vessel cannot insure the amount of his *charter-money*, under the general name of *freight*. The policy itself is the evidence of the contract of insurance, and parol proof cannot be admitted to show that the plaintiff, under the name of freight, *intended* to insure the *profits* on his charter-party.

In a policy on freight supposed to be valued, the sum insured cannot be *assumed* as a valuation of the freight, nor adopted as conclusive evidence of the amount of the charterer's interest. It *seems* that the true rule by which that interest is to be ascertained, is the actual freight which the vessel did or could earn.

Where a chartered vessel is lost by the perils insured against, the charterer's interest in a policy on freight, *eo nomine*, never attaches; and if the premium has been paid, it can be recovered back in an action for money had and received.

THIS was an action upon a policy of insurance, tried before the Chief Justice on the 14th day of November, 1828. The words of the policy, which relate to the voyage and property insured,

were as follows : " C. M. Mellen and James Nesmeth, *on account of themselves* do make insurance and cause to be insured, lost or not lost, at and from New-York to and at St. Croix, and at and from Tobasco, and at and from thence back to New-York, \$2,500 upon the freight of all kinds of lawful goods and merchandises laden or to be laden on board the good schooner, called the Enterprise, at a premium of four and a half per cent. Loss to be paid in thirty days after the proof of interest and proof of loss."

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The declaration contained four special counts, (each stating the insurance to have been effected by the plaintiffs on their own account,) together with the usual money counts.

The vessel was lost on Tobasco bar at the entrance of Tobasco river, on her voyage from St. Croix to Tobasco, and was abandoned to the underwriters ; but the defendants objected that the plaintiffs had exhibited no proof of interest in the subject matter of the insurance.

At the trial, the plaintiffs produced the following preliminary proofs, viz :

I. A letter from themselves to the defendants, bearing date the 28th of April 1828, setting forth a list of the proofs previously furnished. The letter was in these words, viz : " Gentlemen, having already exhibited to you the following preliminary proofs of loss under the policies, effected at your office, on the cargo and on the freight of the schooner Enterprise, on the 2d of November last, namely : I. A bill of lading of cargo shipped by us, on board said schooner : II. An invoice of the goods, with an affidavit thereto : III. The protest of the master, extended before R. M. Blatchford Esq., Notary Public. IV. The account sales of the goods sold at St. Croix : V. The account sales of the goods saved from the wreck of the Enterprise, referred to in said protest of the master. We now, for your further satisfaction, exhibit herewith a protest or note thereof made before J. H. Ney, first magistrate of the vil-

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"lage of Guadaloupe, together with a report of Edward Porter  
"and Charles K. Holmes, thereto annexed; and also a *charter-*  
"party made between the said master and ourselves, with a bill of  
"lading of certain goods, shipped, from New-York in said  
"schooner, with an affidavit of our James Nesmeth, as to the  
"agreement for freight therein mentioned, and a bill of lading  
"of sundry doubloons shipped at St. Croix: Mr. Robert Elwell  
"having, by our authority, *abandoned to you*, the cargo shipped  
"by us *and also the freight*. We beg leave to enquire whether the  
"company require any further preliminary proofs of loss or  
"interest. We shall consider you as satisfied on this point, unless  
"we hear from you some intimation to the contrary; in which  
"case, we shall supply any defect therein forthwith, if any  
"there be."

The plaintiffs then produced, II. The *bill of lading* referred to in the foregoing letter acknowledging the receipt of the goods therein mentioned, from the plaintiffs, and stipulating for their delivery at St. Croix or Tobasco, to James Nesmeth or his assigns, together with an *invoice* of the same, amounting to \$1,923,33, in which it was stated that the goods were shipped by the plaintiffs on joint account, for St. Croix and Tobasco, consigned to Nesmeth, (who was on board the vessel) for sale. These were accompanied by the affidavit of Nesmeth, as to the correctness of the invoice. The plaintiffs also produced, III. A *charter-party*, between themselves and the agent of the owners of the vessel, whereby she was let to the plaintiffs for the foregoing voyage. By this charter-party the plaintiffs covenanted to pay the sum of three hundred and sixty-two dollars and fifty cents *per month* for the use of the vessel, "*payable on the delivery of the cargo at New-York*," together with all pilotage, port-charges, custom-house dues and fees of every description both at St. Croix and at Tobasco.

The plaintiffs were also *to advance* to the master, such an amount in cash, as might be wanted for disbursements or expenses during

the voyage ; the money *so advanced*, to be considered as a *payment on account of the charter-party of the vessel* ; and for which no interest, commission or premium was to be charged. Nesmeth was also to have the privilege of going in the schooner without any charge for passage, he finding his own stores.

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IV. The protest of the master before the Notary in New-York was then produced by the plaintiffs, which stated that the vessel "was lost by the perils of the sea, at the entrance of Tobasco river, on Tobasco bar, on her voyage from St. Croix to Tobasco : that a part of her cargo was there lost, and a part plundered by soldiers and by inhabitants of the country. The remaining part was carried to Tobasco and there sold by the American Consul."

V. An account of the sales of part of the cargo at St. Croix, amounting to \$232,46, was then produced by the plaintiffs, together with an account of the sales of the goods saved and sold at Tobasco, amounting to \$330,58, and a bill of lading of certain goods shipped at New-York, by Peck & Co. on freight. These were accompanied by the affidavit of Nesmeth referred to in the foregoing letter from the plaintiffs to the defendants, and his account of sales made at St. Croix. A statement of expenses paid at St. Croix on account of the vessel, amounting to \$101,35, was also produced, together with an accompanying affidavit of Nesmeth.

Upon this state of the preliminary proofs, the counsel for the defendants moved for a non-suit, upon the ground that the plaintiffs had not shown any interest in the subject-matter of the insurance. This question was reserved by the presiding Judge for the consideration of the whole court, and the plaintiffs proceeded to their proofs in chief.

The whole of the documentary evidence, exhibited by the plaintiffs among their preliminary proofs was then received, by consent, as if proved in chief, subject to all legal exceptions, and the loss of the vessel as stated in the protest was admitted by the defendants.

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The counsel for the plaintiff then *offered* to prove that the defendants were *fully informed as to the nature of the voyage*, before the insurance was effected, and that the defendants had been requested by the plaintiff to insure *on profits*, at the time when application for insurance was made: that they declined to insure on profits, *as such*, but said they would insure them *as freight*; and that the defendants were particularly informed, that the plaintiffs intended to invest the proceeds of their outward cargo at Tobasco in logwood, and bring the same to New-York.

This testimony was objected to on the part of the defendants, and the Chief Justice intimated an opinion that it was inadmissible; but for the purpose of bringing the claims of the plaintiffs fully before the court, the evidence was admitted by consent, subject to the defendants' objections. The plaintiffs here rested their cause, and the counsel for the defendants again moved for a non-suit; but the motion was overruled by the presiding Judge, who thought there was, at least, *some* evidence of an interest on the part of the plaintiffs, in the *freight of the goods shipped by Peck & Co. at New-York*.

The counsel for the defendants then produced a bill of lading of 150 barrels of flour, 40 casks of nails, 30 barrels of pork, 60 boxes of raisins, 53 bundles of shingles, 100 puncheons of corn-meal, and 100 cypress shingles, shipped on board the Enterprize at New-York, by Ballestier & Co., to be delivered at Bass, in St. Croix, unto Adam McCatchin, or his assigns, he or they paying freight *as per charter-party*. On the back of this bill of lading were endorsed *articles of agreement*, between Ballestier & Co. and Nesmeth as *charterer* or owner of the vessel, in which the latter let to the former, "the whole of the hold and deck of "said schooner, (excepting only the cabin and 50 barrels room "under deck for his use,) for a voyage from New-York to St. "Croix, for the sum of \$450," and the port charges of the vessel.

It was admitted that this freight money, together with \$118 for port charges, had been paid to the plaintiffs by Ballestier and Company.

The plaintiffs then offered to prove, that the usual period for the voyage described in the policy was three months and a half ; and they claimed a verdict for \$882,60, according to the following statement :

The whole amount of *freight valued* in the policy at \$2,500.

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|            |                                     |           |                 |
|------------|-------------------------------------|-----------|-----------------|
| Deducting. | Charter, 3 1-2 months, at \$362,50  | \$1268 75 |                 |
|            | Expenses paid,                      | 101 35    |                 |
|            | Amount received of Ballestier & Co. | 450 00    | 1617 40         |
|            |                                     |           | <u>\$882 60</u> |

The plaintiffs also claimed that they were, *at all events*, entitled to recover the amount of the expenses paid at St. Croix, and the *freight* of the goods of Peck & Co., or a return of the premium which had been paid, amounting to \$113,75.

A verdict for the sum of \$1000 in favour of the plaintiffs was taken by consent, subject to the opinion of the Court upon the following points :

I. Whether the plaintiffs should not have been non-suited.

II. If the plaintiffs were entitled to recover, then how much : the verdict to be adjusted according to the opinion of the court. The amount of the loss of freight on the shipment by Peck & Co., if adjudged recoverable, was also to be adjusted under the direction of the court ; either party having leave to turn the case into a special verdict or bill of exceptions.

The cause was argued by *Mr. R. Sedgwick*, for the plaintiffs, and by *Mr. J. Anthon*, for the defendants.

*Mr. R. Sedgwick* contended,

I. That the plaintiffs having hired the whole body of the vessel for a specific voyage, and a sum certain, were to be considered as owners, *pro hac vice*. By a contract with Ballestier & Co., they under-let the vessel for a larger sum than that which they had stipulated to pay ; they have, therefore, an insurable interest

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in the freight, at least to the amount of the difference between the sum contracted to be paid and that which they were to receive.

The whole freight in this case *was valued* by the parties, and the valuation fixed at \$2500: the defendants being made acquainted with the nature and objects of the intended voyage. The plaintiffs had therefore an insurable interest in the freight of *their own goods*, and in the freight of the goods of others, to the extent of the *difference* between the *valuation* and the sum to be paid by them for the use of the vessel, deducting from such difference the freight-monies saved.

That the *construction* to be given to the policy cannot be varied by parol proof, is readily admitted; and no attempt was made at the trial to vary its true meaning by the introduction of such proof. But the plaintiffs offered to show, that the defendants, being requested to underwrite on *profits*, declined to insure them *as such*, but offered to insure *profits* under the name of *freight*. This testimony was admissible for the purposes for which it was offered.

The term freight, sometimes denotes a compensation for the transportation of goods, and sometimes for the use of the ship. [*Phil. on Insurance* p. 51.] This definition applies to cases where the owner *charters* his ship or carries the goods of *others*; but it does not embrace the case where an owner or charterer carries *his own goods*. Freight, then, properly defined, is the profit derived from the use of a vessel. [3 *John. Cas.* 39.] Strictly speaking, where the ship-owner carries his own goods, in his own vessel, there is no *freight*; but the *profit* on his goods is the *freight*,—the difference in their value, arising from their difference of place. The owner then, insures profits instead of freight; the plaintiffs intended to do the same thing. Let them show that there were profits in fact under their contracts, and they are entitled to recover. [*Mumford v. Hallet*, 1 *John. Rep.* 439. *Phil. on Insurance*, §19., also 47, and the cases there.]

II. If the plaintiffs cannot prevail upon the principles stated, then they are entitled to recover the amount claimed, on the



ground that the freight of their own goods, and those of Peck & Co., are to be deemed *as valued at \$2500.*

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In England, a charterer cannot insure beyond the amount of the freight which the ship can earn, together with the necessary charges, &c. [*Forbes v. Aspinwall*, 13 East. 323.] But there is nothing in the policy of our laws to prevent the contracting parties, from insuring every thing they may choose, and fixing the valuation at any given amount. [15 *Mass. Rep.* 341. *Phil. on Ins.* 317.] Even wager policies are allowed, and where the parties insure a specific sum on certain goods, the valuation is *conclusive*, and the policy cannot be opened. If the policy be an open one, then the actual freight is to be ascertained: but if the policy be valued, then the valuation fixes an estimate upon the subject insured and supercedes the necessity of proving its value. [1 *John. Rep.* 439.] In every case, therefore, of a valued policy on freight, we have only to ascertain what the *subject is*, on which the valuation attaches.

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In this case, the defendants, at the time when the insurance was made, knew what specific goods were to be put on board the *Enterprise*, and with this knowledge *agreed* to value the freight at \$2,500. The parties *intended* to insure that sum, on freight from New-York to St. Croix: the same amount from thence to Tobasco, and the like sum from Tobasco, back to New-York. The valuation being fixed by agreement, is conclusive upon the parties, and the insurance attaches from place to place. [*Davy v. Hallet*, 3 *Caines* 16.] The *quantity* of goods put on board can make no difference unless there be fraud, and there can be no fraud where the insurers are made acquainted with the exact state of facts. [*Phil. on Insurance*, 306-7.] The only question in such cases is, whether there has been a total loss of the subject of the insurance, to which the valuation applied.

Here the parties understood perfectly well what the property insured or intended to be insured, was; and there has been a total loss of the subject of the insurance. The loss of the vessel and the breaking up of the voyage is not denied; but if denied is fully proved.

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III. The plaintiffs at all events are entitled to recover the amount of the expenses paid at St. Croix and the *actual* freight of Peck & Co's goods. If the charter had expressed that the money advanced was in part payment of freight, then the loss of the ship would bring upon the freighter a loss of the money advanced and thus create an insurable interest in him. [4 B. & A. 582. *Phil. on In.* 55.]

IV. If the Court, however, should be of opinion that the plaintiffs are not entitled to recover upon any of these points, it must be for total want of interest in the subject sought to be insured: and upon this ground, they are at all events entitled to recover back the amount of the premium paid.

*Mr. Anthon* for the defendants, *contra*.

I. The plaintiffs being *charterers* of the vessel, and not *owners*, and the charter-money being payable upon the delivery of the cargo in New-York, the plaintiffs had no insurable interest in the freight, *eo nomine*. This is well settled. [*Cheriot v. Barker*, 2 *John. Rep.* 346. *Riley v. Delafield*, 7 *John. R.* 522. *Robins v. The New-York Ins. Co. in this Court*, ante p. 325]

The ground upon which the plaintiffs rely is, that the vessel being underlet by them, there is an excess of freight to be received by the charterers, over the charter-money to be paid; and that they have an insurable interest in the freight to the amount of the excess.

If this were true in point of fact, no such interest is disclosed by the policy; neither is there any count in the declaration to meet the claim. The declaration contains four counts; the first proceeds entirely upon the ground that the plaintiffs were *owners*. The second sets forth that they were the exclusive *charterers* of the vessel; that the goods shipped were put on board by them to be conveyed for them, and on their account. The third differs from the second in nothing but the averment as to the loss, and the fourth is like the first, except in the averments relative to loss.

The plaintiffs' claim, therefore, is not sustained by his pleadings, and if well founded, they could not recover on this declaration. But in point of law, the parties are bound by the policy, and must take the contract as they have seen fit to set it forth in writing. There is nothing in the policy to warrant even the supposition, that any thing was insured by the charterers, except the freight which they were themselves to pay.

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II. If the plaintiffs had any insurable interest, it was in the freight reserved to them by Peck & Co.'s bill of lading. The amount of that freight was a mere *minimum*, being only about \$30; and if necessary, the Court would open the policy, on account of the excessive over-valuation. [13 *East*. 323. *Kane v. The Com. Ins. Co.* 8 *John. R.* 229.] But as this bill of lading stipulated for the carriage of the goods to St. Croix or Tobasco, the whole freight under the bill of lading was earned upon the safe arrival of the vessel at St. Croix. There was therefore no loss of that freight.

All that the plaintiffs could have at risk after this under the policy, was the freight on the undelivered portion of Peck & Co.'s goods, on the voyage from St. Croix to Tobasco. But the plaintiffs have shown no reservation of freight to themselves by any contract for that voyage, and cannot, therefore, recover for its loss.

III. The plaintiffs offered parol proof to show that the defendants knew what the subject of the insurance was. This testimony was clearly inadmissible, the policy itself being the evidence of the contract. It were unsafe to admit any other on principle, and it cannot be done by authority. [2 *John. Rep.* 346. *New-York Ins. Co. v. Thomas.* 3 *John. Cases*, 1. *Phil. on In.* p. 8.] If such testimony could by any rule of law have been received, there is no count in the declaration to which it could be applied; all the counts alleging an interest in the freight, and a loss of freight *eo nomine*. But there are no facts on which the plaintiffs can rest their hypothetical case. By their contract with Balles- tier & Co., they transferred the whole of the vessel to them for the

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voyage to St. Croix. The vessel arrived at the last mentioned port in safety, and Ballestier & Co. paid to the plaintiff the whole of their charter-money, together with all the port charges. This transfer divested the plaintiff of all interest in the vessel, within the terms of the policy.

IV. The bill of lading of the goods of Peck & Co. creates no insurable interest in the charterers, according to the doctrine laid down in *Cheriot v. Barker and Riley v. Delafield*. But if there was any such interest, it was merely to the extent of that bill of lading; and the goods of Peck & Co. having arrived in safety at St. Croix, the risk ended there.

The plaintiffs never insured their interest in those goods, (if any such they had,) beyond St. Croix, because the risk was to end at one of the *termini* of the voyage. If they had paid money in advance to the owner, it is not covered by the policy, and might be recovered back of him. [*Mansfield v. Maitland*, 4 Barn. and Ald. 582.]

V. The policy having having attached to the extent of the outward freight on the cargo to St. Croix, there can be no return of premium. The premium was earned upon the vessel's arrival at St. Croix, and the risk terminated there. The plaintiffs ought therefore to have been non-suited on their preliminary proofs, or upon the proofs in chief under them.

JONES, C. J., (after stating the facts of the case.) The first general question for the court is, whether the plaintiffs have shown any insurable interest in freight to which the policy can attach. They were not the owners of the schooner, but the charterers of her. She was let to them by the agent of the owners, for the voyage on which she sailed, for the specific sum of \$362 1-2 per month, for the entire use of her, payable on her return from the voyage to the port of New-York.

It is settled by the Supreme Court, in the case of *Cheriot v. Barker and Reilley v. Delafield*, and in the late case of *Robins v. The New-York Insurance Company*, in this court,\* that the char-

\* Ante, page 325.

term of a vessel, who is to pay the charter-money for the use of her at the end of the voyage, cannot insure the freight of her or *nomine*. The principle which governs those cases, appears to me to apply to this. The charterer has no interest at risk, which he is to protect by insurance; his liability to pay the charter-money depends upon the safe arrival of the ship, and the performance of the voyage. If she is lost, or fails to perform the charter, his obligation to pay the charter-money ceases. What interest, then, can he have in her carrying a freight, which, if lost, he is discharged from his liability to pay? It is the ship-owner, whose title to the freight he reserves by the charter-party, depends upon the performance of the voyage, that runs the risk, and is to suffer by the loss of the voyage, and to him belongs the corresponding right to insure.

But the counsel contends, that this case is an exception to the rule, and we will briefly examine the grounds he takes to distinguish it in principle from those we have cited.

First, it is urged, that the insurers being fully informed of the nature of the intended voyage, the plaintiffs, as owners of the vessel, *pro hac vice*, had an insurable interest in the freight of their own goods, and of other goods carried on freight, to the extent of the difference between the valuation of the freight in the policy, and the sum they were to pay for the charter of the vessel, after deducting from such difference the freight-money earned and paid to them.

This proposition, as stated, is somewhat complicated. It involves the consideration of the bearings of the verbal communications and agreements offered in evidence at the trial upon the contract of insurance, and the legal effect of the valuation of the freight upon the rights and obligations of the parties. Upon the first branch of the proposition, the plaintiff is met at the threshold with a difficulty which seems to us insuperable. He seeks, in direct contravention of a settled rule of construction, to introduce parol evidence to vary the written contract, and essentially to alter the sense and meaning of the agreement it purports to express. The terms of the contract are clear, explicit, and perfectly intelligible. It is a policy of insurance on the

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freight of goods and merchandise on board the schooner *Enterprise*, for the voyage described in the policy, and the freight insured is valued at \$2,500, the sum insured upon it. Now could language be more explicit or free from ambiguity or doubt? What room is there for explanation by parol, unless it was admissible to show that the actual contract of the parties was different from the agreement they have expressed and reduced to writing. But the rules of law admit of no such explanation by parol; we must adhere to the agreement as we find it in the written contract, and content ourselves with giving it its true construction.

In the case of *Mumford v. Hallet* the insurance was upon profits; the broker made use of a blank form of a policy on goods, and the valuation intended to apply to profits, the previously declared subject matter of insurance, was inadvertently inserted in the blank left in the policy for the valuation of the goods, but without mentioning profits as the subject to which the valuation was intended to be applied, whereby the valuation was mistakenly made to refer to goods and not to profits. The intention was obvious, and the mistake plain and palpable. Yet the court held the parol evidence of the broker inadmissible to explain it, or to rectify the errors, because the legal effect would be to vary the written agreement and alter the sense and operation of one of its prominent stipulations, and the insurance was in that case rescued from destruction at law, by the application (though I believe for the first time) of the principle that a policy on profits is necessarily and in its own nature a valued policy, and the profits in the absence of any express valuation by the parties, must be understood and taken as valued at the sum insured.

In the case now before us, the pretensions for a recourse to parol explanation are much weaker, than they were in that just cited. In that case, the subject matter of the insurance, appeared on the face of the policy to be profits, and the obvious intention of the parties to refer the valuation to that subject was relied on. It was urged with great force, that the valuation if referred to the goods out of which the profits were to grow, would be nugatory, and without any appropriate relation to the principal contract, but that if applied to profits, the subject matter

of the insurance, it would be an apt, usual and operative provision; indeed, that necessity required such constructive application, to give effect to the contract. But it was answered that the valuation, applied to the goods had a meaning, and the parties might intend to value the goods, and to leave the policy upon the profits open, and that the difficulty of proof of interest under such a policy in case of loss, however embarrassing to the assured, could not justify the court in breaking over an established rule of evidence for their relief.

In this case the insurance is upon freight, and the valuation is of the freight insured. There is no feature upon the face of this policy, indicating any mistake or misapplication of the terms employed, and no incongruity between the subject of insurance and the valuation in the policy, or other internal evidence of mistake or error. The proof offered is altogether extrinsic, and its object is to shew, that other and further interests, not embraced in the policy according to the ordinary construction of its terms, were intended, and verbally agreed, at the time of the contract, to be included within it and covered by its protection. Such testimony must surely be excluded by the rule which forbids the reception of parol evidence to vary or enlarge the terms of a written agreement. A closer view of the proof offered by the plaintiffs will exhibit the objection to it in a yet stronger light: the offer was to shew, that the defendants were acquainted with the nature of the voyage, and knew that the plaintiffs intended to vest the proceeds of their outward cargo in a return cargo, to be brought home in the schooner, and with such knowledge, consented and agreed, that the profits of the returns, which they refused to insure separately, and as profits, *eo nomine*, might be included in the freight policy, and covered by a valuation of the freight. The agreement then was that the profits should be covered by the policy on freight, and that the freight should, for that purpose, be insured at a valuation sufficient to cover both interests; and if that was the sole object of the parties, this policy was sufficient; for the valuation agreed upon, covers all the claims of the plaintiffs, and if they had an insurable interest in freight, which could impart vitality to the policy, they would be entitled to the whole

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valuation as the measure of their loss, accounting to the insurers for what was earned and saved.

But the parol agreement to be of any avail to the plaintiffs must go further, it must be shown that the defendants were fully informed of the relation in which the plaintiffs stood to the vessel, and knew them to be insured as charterers only and not the owners of her : and with that knowledge entered into a special agreement to insure for them as owners *pro hac vice*, the earnings of the vessel for the voyage, as, and in the name of freight, and to value the same at a sum sufficient to cover both the earnings and freight, and the profits of the return cargo ; and that for those purposes a policy on freight in the common form should be made use of without reducing the special agreement into the form of a special contract. Would evidence of such an agreement be compatible with the policy before the court ? Would it not establish an entirely new contract, and wholly supersede the subsisting policy ? The parol proof disclosed in the case does not support such an agreement. It shows that the defendants, were acquainted with the nature of the voyage, and the intention of the plaintiffs to invest the proceeds of the outward cargo in returns, and agreed to insure the profits of those returns by comprehending them in the valuation of the freight : but it does not show that they were apprised or knew that the plaintiffs were the charterers only, and not the owners of the vessel, or that they entered into any special contract to insure for them, as charterers, the freight of goods to be shipped by themselves, or to be taken by them on freight, for others, to be carried in her. What the effect of such a special contract, with such knowledge of the title and ownership of the plaintiffs, upon the rights of the parties, might be, if properly brought before the court, I do not stop to enquire ; but a general insurance on freight by the charterer, without a disclosure by him of his title, or any special agreement for the insurance, we have already seen would be inoperative and void, for want of insurable interest ; and all agreements are engrafted upon it, not giving it a new insurable interest, must be equally inoperative ; and if any special agreement, is relied on to give it



operation, it must appear in the policy, and cannot be supplied and superadded by parol.

But the plaintiffs insist that they had an insurable interest as owners *pro hac vice* in the excess or surplus of the freight and earnings of the schooner on the voyage, over and above the price or amount payable by the charter-party. This surplus freight, thus supposed to constitute an insurable interest, must intend the freight and earnings of the vessel for the transportation and carriage of the goods of strangers under contracts with the charterers as owners of her; for the charterers can found no claim upon the insurers for any loss of benefit to themselves for the use or employment of the vessel in the transportation of their own goods, however great or valuable that benefit might be. The whole tonnage and use of the vessel is purchased by the charterer for the voyage, to be paid for, upon the contingency of the performance of the voyage. If the voyage is lost, the purchase money never becomes payable, and in case of its accomplishment, the benefits of the charter, if favourable, are realized in the profits of the adventure. But the chartered vessel may be underlet, or employed as a general ship for the carriage of goods, under bills of lading, for specified freights payable to the master as agent of the charterer. In that case, the loss of the voyage would produce no loss to him unless the freights payable by others to him, on the safe arrival and delivery of the goods, exceeds the amount of the charter-money, which on such safe arrival, would become due from him to the owner for the charter. But it may so happen that the freights payable by the shippers to the charterer, or his agent, as owner *pro hac vice*, may exceed the charter-money payable by him to the general owner for the use of the ship for the voyage.

What would be the rule in the case of a surplus, whether such excess would be held an insurable interest in the charterer, or not, and whether if insurable, it would be covered by a general policy on freight *eo nomine*, or would require a disclosure and specification of the nature of the interest; and whether such disclosure and specification would be requisite to a binding valuation of the interest, are questions which we deem it unnecessary in this case to agitate, for here was no surplus. The plaintiffs underlet the whole

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deck and tonnage of the schooner (with the exception of the cabin and space under deck for 50 barrels, reserved for their own use) to J. Ballestier & Co. by charter-party for the voyage to St. Croix, for the gross sum of \$450, and the port charges. The goods shipped by the plaintiffs of course occupied the reserved room of 50 barrels, or part of it, but did not exceed \$2000 in value, and allowing the freight at one-third of the charter to Ballestier & Co., the entire freight of the two would amount to \$600. The freight of the shipment of Wm. M. Peck & Co., of the small invoice of goods consigned to Nesmith, which must also have been stowed in the cabin, or the reserved space of 50 barrels, could not have materially varied the result, and the whole aggregate amount of freight and earnings of the vessel for the voyage to the plaintiff, would be highly estimated at \$700, and the amount of the charter-money payable by them for two months only, (and 3 1-2 is shown by the plaintiffs to be the usual length of such a voyage,) would amount to \$726.

But the plaintiffs insist on the valuation in the policy as the measure of the freight the vessel would have earned for them upon the voyage, and claim the excess of that sum, beyond the amount of the charter for three and a half months, the usual length of the voyage insured, as the surplus interest covered by their policy; which, after crediting and deducting the freight of Ballestier & Co., which was earned and paid to him, they are entitled to recover. But this claim is clearly untenable. The valuation is of the whole freight of the vessel for the voyage, and the plaintiffs to avail themselves of it, to its whole extent, must show an insurable interest in the entire of the freight. It refers to the insurable interest of the assured, which the policy is intended to cover, and is never understood or intended as the true and actual value of the interest, which would be recoverable on an open policy, but as a sum agreed upon for the measure of the indemnity in the event of a loss. How then can it be assumed, as the evidence of a surplus interest in the charterers beyond what was payable by them under the charter-party? They must first prove the fact of such surplus interest to have existed before they show any insurable interest to which that valuation could apply to the insur-

ers as owners *pro hac vice*. The most cursory view of this policy must satisfy any observer, that it had no reference to any special interest in the assured, as charterers, covering the surplus of the freights reserved to themselves over the freight payable by them to the owner for the voyage. It is in terms a general insurance on the freight of the vessel for the voyage, and it may be questionable whether, standing unexplained as it does, it is not to be restricted to the freight she was to earn for her owners; but if it admits of an application to the freight and earnings which the assured, as charterers, had at risk, it was incumbent on them to show that they actually had freight, reserved to themselves at risk, beyond the amount of their *contingent* liability on the charter-party to establish an insurable interest in themselves, to which the policy could attach, and on which the valuation could be engrafted. They have shown no such surplus freight reserved to themselves, and of course have shown no right to recover on that ground.

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But it is said that the plaintiffs had an insurable interest on the shipment of Peck & Co., because it was a general shipment by bill of lading and the freight payable to the plaintiffs as owners, and that the valuation may be applied to that interest. The nature and precise amount of the freight payable in respect of this shipment, the circumstances attending it, and its final destiny, are not disclosed, or but obscurely stated; but they are of minor importance, for the freight of that shipment, whatever its form may be, must equally with the freight of the plaintiffs' own goods come within the rule we consider applicable to the case, and the charterers can have no insurable interest under this policy in the freight of any goods shipped in this vessel for the voyage in question, unless the aggregate amount of their freight exceed the charter-money; in which case, and then only, the question of the right of the plaintiffs to recover upon a contract in the general form of this policy would arise.

But suppose it were otherwise, and this freight should be held recoverable as the fruit of a general shipment by bill of lading with the plaintiffs as owners for the voyage, it would still be a mere isolated item of interest, the loss of which, if shown, might

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give the assured a claim to the extent of their interest, but to which it would be most extravagant and preposterous to apply a valuation so vastly disproportionate, and so manifestly intended to be applied to the whole freight of the vessel for the voyage.

But we are relieved from this embarrassment in the present case, by the consideration, that this item of freight, whether the shipment was in reality on the account and risk of Peck & Co. as general shippers, or partook of the benefit of the plaintiffs' charter-party, and was made under some arrangement with them for joint account, formed part of an aggregate amount of freight and earnings which fell short of the sum payable by the plaintiffs for the charter of the vessel for the voyage: and in the freight and earnings of which vessel for that voyage, to the extent of the charter-money, they could have no insurable interest, because if the voyage should be successful, and the freight be earned, it must be paid over in satisfaction of the charter, and if lost, as freight would be payable by them, and consequently be lost to them, the loss of the vessel freed the charterer from all payment of compensation for the use of her to the owner, as the loss of the voyage excused him from the delivery of the goods of Peck & Co. at the foreign port. He has in truth lost nothing, for if he had earned Peck's freight, it would have been exhausted by his payments to the owners.

Another claim is made for \$101,35, for the expenses of the vessel at St. Croix. But the plaintiffs covenanted to pay all pilotage, port charges, custom-house dues, and fees of every kind, both at St. Croix and Tobasco; and Ballestier & Co. agreed with them to pay all port charges at St. Croix. These expenses were not advanced to the master, but were paid by him out of the freight of Ballestier, which was earned by the schooner. They constitute no claims against the insurers; the plaintiffs, therefore, had no insurable interest in the freight of this vessel, and have sustained no loss for which they are entitled to recover. It follows that they are entitled to recover back the premium, and for that they must have judgment.

**HOFFMAN J.** This is an action brought by the *charterers* of a vessel, to recover of the underwriters, the amount of an insurance upon the *freight* of goods laden on board the Schooner *Enterprise*, on a voyage from New-York to St. Croix, from thence to Tobasco, and from Tobasco back to New-York: the amount of the charter being payable on the arrival of the vessel at the last mentined port.

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It is settled by authorities which are perfectly conclusive, that a charterer cannot ensure the amount of his *charter money*, under the general name of *freight*; and nothing is perceived to distinguish this case in principle from those long since decided. The principle is obvious: the charterer has no interest in the subject matter of the insurance. If the vessel be lost, he has no freight to pay, and of course cannot have any thing at risk. It is the privilege of the *owner* to insure the freight, for in case of loss, the injury falls upon him.

If the plaintiffs had any particular object in view other than that disclosed by the policy; if they had wished to cover any actual interest of their own which they were about to put at hazard, or if they had advanced the amount of the freight-money, they might easily have been protected, by using appropriate words in the policy, to express their meaning. But judging the contract by the words used by the parties, there is no difference in point of principle between this case and that of *Cheriot v. Barker*. [2 *John. Rep.* 346.]

The plaintiffs offered to show, by parol proof, that it was their *intention* to insure the profits on their charter-party, under the general name of freight. The policy itself is simply on freight; and if the Court were disposed, in a plain and intelligible contract, to look beyond the obvious import of the words, to discover the meaning of the parties, the case of *Cheriot v. Barker* is a conclusive authority against the introduction of the parol proof. The policy itself speaks in unambiguous terms, and needs no extraneous aid to give it meaning. If the defendants had actual knowledge as to all the objects of the voyage, that can in no way vary the agreement between the parties, which is to be determined by the policy itself.

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The plaintiffs, however, contend that there was an excess of freight in their favour; that is, that they, having underlet the vessel to Ballestier & Co. for a voyage to St. Croix, were to receive from them for the use of the vessel, a sum greater than that which they were to pay to the owner. It is unnecessary to inquire what the rule would be in a case of surplus interest, since there is no proof, in the present case, of the existence of such an interest. The freight to be received by the plaintiffs from Ballestier & Co. and from Peck & Co., does not amount to the sum which the plaintiffs were to pay for the use of the vessel under the charter-party.

But it is supposed that the sum insured amounts to a valuation of the interest of the charterers, and that the defendants are concluded, by their own agreement, from contesting this point. The sum insured cannot be *assumed* as a valuation of the freight, nor adopted as *conclusive* evidence of the amount of the charterer's interest. The true rule by which that interest is to be ascertained, is the actual freight which the vessel did or could earn. Now it is not pretended that this vessel did earn, or could have earned, freight to the amount of \$2,500. If the parties, having full knowledge of the subject to be insured, establish a valuation upon it by express agreement, that valuation will not be set aside merely because it was fixed at a high rate. There must, however, be some proof of the intention of the parties, thus to fix a valuation which cannot be disturbed; and in this case there is no evidence of such intention, unless the sum insured be taken as such evidence. But the amount of the insurance, as was before remarked, cannot be assumed as evidence of the intent to fix a valuation, and much less is it to be considered as conclusive upon this point.

As the sum insured cannot aid the charterers in fixing a valuation upon their interest in the subject of the insurance, the question as to the freight of the goods of Peck & Co., and the plaintiffs' own goods, is disposed of. As to the breaking of bulk at St. Croix, the testimony upon that point is not sufficient to establish the fact, and all considerations arising from that source may be laid aside.

As the freight-money to be received by the plaintiffs is not equal in amount to that which they were bound to pay, they had no actual interest in the subject matter of the insurance; for they were discharged by the shipwreck from the obligations of their own contract under the charter-party. If the vessel had gone safe, the plaintiffs would have received a small sum from Peck & Co.; but in that case, they would have been compelled to pay, not only *that*, but a much larger amount, to the owners of the vessel. They have been gainers, therefore, by the shipwreck, rather than losers, and can have no cause of complaint from any supposed hardship of the case. The expenses for which a claim was made, were paid by Ballestier & Co., and of course are not to be refunded to the plaintiffs by the insurers. No interest, therefore, attached in this case; the plaintiffs had nothing at hazard; the defendants have borne no risk, and the premium must, of course, be returned to the plaintiffs.

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*Judgment in favour of the plaintiffs for the amount  
of the premium.*

[D. D. Field, *Att'y for the plffs.* E. Anthon, *Att'y for the defts.*]

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RICHARD HARCOURT *versus* JOHN T. HARRISON.

It is well settled, that in an action of slander for words which are not actionable *per se*, the plaintiff cannot recover, unless he shows special damage as the consequence of the words. And *quare*? Whether words spoken by a public officer in his official capacity concerning another, are ever actionable? And if so, whether the plaintiff must not show express malice in order to maintain the action?

THIS was an action on the case, brought to recover damages of the defendant, for defamatory words, spoken by him of the plaintiff. The declaration contained three counts. The first count charged the defendant with uttering and publishing, on the 11th day of June in the year 1828, false, slanderous and defamatory words against the plaintiff to James R. Manly and Smith Cutter, two of the health commissioners of the city of New-York, (*"the said defendant being also a commissioner of health,"*) the plaintiff then being steward of the Marine Hospital at Staten Island, which office he had held for twenty-six years and upwards.

The words charged were as follows:—"He, (meaning the plaintiff) sold or disposed of to one ——— Gibson, a fine coat, "belonging to a person who died in the Marine Hospital, and "which had been claimed by one English, a relative of the said "deceased person, but that he (the defendant) could get no account of it; that the commissioners had sent down two men to "search his (the plaintiff's) house on suspicion of having hospital "property concealed in his garret, and that he (the plaintiff) had "in his possession concealed, a cask of empty bottles or vials "which were the property of the hospital."

The second count charged the defendant with having falsely and maliciously proclaimed and published in the presence of divers good and worthy people of this state, the following words, viz: "he (meaning the plaintiff) is a thief, and he had been "twenty years or upwards in the establishment of the hospital, "and become rich by stealing and pilfering."

The third count charged the defendant with having spoken and published the words following, viz: "He (meaning the plain-



"tiff) is a thief." "By reason whereof the said James R. Manley and Smith Cutter, health commissioners as aforesaid, removed and displaced him the said plaintiff, from the office of steward of the Marine Hospital at Staten Island, and have always since refused to employ him as such steward; whereby he the said plaintiff hath been and still is out of employment, and is deprived of the means of supporting himself and his family, and hath sustained damages to the amount of ten thousand dollars."

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The defendant pleaded *the general issue*, and the cause was tried before Mr. Justice OAKLEY. At the trial the plaintiff called one Ellen Douglass as a witness, who testified, that she had been two years at the hospital; that in the month of June 1828, on a Sunday, the plaintiff and defendant entered the hospital in anger; the defendant dismissed the plaintiff and locked the door, and said, "you are a foreigner, you have made your riches by pilfering and stealing, you have sold coats and sent them up the country;" to which the plaintiff replied, "you are a Jerseyman, or a scoundrel."

Doctor James R. Manley, a witness for the plaintiff, testified, that he went down to the quarantine ground with Doctor Cutter, in consequence of a letter which the commissioners had received from Doctor Harrison, stating that he had dismissed Richard Harcourt for insubordination and disorderly conduct. The defendant *officially* communicated to the witness and Doctor Cutter, the other two members of the board, the reasons why the defendant had dismissed the plaintiff; and that the declarations of the defendant were all made *officially* to the witness and his colleague, in the course of their *official duties, acting as commissioners of health*. That himself and the other commissioner, Doctor Cutter, refused to dismiss the plaintiff upon the charges contained in the letter; whereupon Doctor Harrison said, if *that* was not enough there were *other* and *public* reasons why he ought to be dismissed. That he had sold or improperly disposed of property belonging to the hospital, and the defendant mentioned particularly a coat belonging to some person who had died in the hospital. That the commissioners had some years before, sent down to search

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his house, and a man by the name of English had claimed the coat, and the defendant said that *Fountain* could tell more about it. Doctor Harrison did not say he knew these charges from his own observation, but he personally knew of the searching of the house. When the plaintiff's son was appointed steward, (a young man who was not of age,) the defendant remarked, that he did not like to have the money pass into the plaintiff's hands. Doctor Cutter being sworn, corroborated the statements made by Doctor Manley in all respects.

James H. Ward, a witness on the part of the plaintiff, testified, that he had heard the defendant frequently speak of the plaintiff's good character. The defendant said, "if we lose him we lose the "best citizen in Richmond county." Upon this evidence the *plaintiff* rested his cause. The defendant then called one Andrew Hyer as a witness, who testified, that on a certain *Sunday* in June he heard the plaintiff and defendant conversing together. The *plaintiff* said, "you might as well call *me* a thief;" defendant said, "no, *I do not* call you a thief,"—"I do not consider you as steward any longer." Plaintiff replied, "I was appointed by your "masters, and will not leave:" neither appeared angry, but conversation was had about clothing.

Doctor Charles H. Havens, a witness for the defendant, testified that the first charge made against the plaintiff by the defendant to the commissioners was for *insubordination*. The defendant then stated that he had public reasons to urge against the plaintiff; and asked Doctor Manley if he had not heard of "*the search*," from Doctor Quackenbos? The defendant also told the commissioners that he had been annoyed by a man by the name of English, about some clothing which he could not be satisfied with; and was perfectly mild while before the commissioners.

Doctor Nicholas J. Quackenbos, being called by the defendant, testified, that a search was made six or seven years ago, in Doctor Dewitt's time, which ended in nothing. Doctor Harrison knew of it then, and they were *all* satisfied that there was nothing in that matter, which could impeach the plaintiff. The plaintiff had been steward of the hospital from its commencement.

John Fountain, a witness on the part of the defendant, testified, that he saw a barrel of vials in a certain place, and told the defendant of their being concealed there. After the plaintiff was dismissed by Doctor Harrison, the defendant called upon him in relation to it, and he then gave the name of the plaintiff to the defendant. The counsel for the plaintiff here interposed an objection to the testimony of Fountain, which was overruled by the Court.

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The defendant then produced one David De Groot as a witness, who testified that he went to see Gibson at the request of the defendant, and Gibson told him that he got the coat from the plaintiff, *and the plaintiff has since told him that he gave it to Gibson, and that it was an old coat thrown away, belonging to the hospital.* The same objection was made to the testimony of De Groot which was interposed to that of Fountain, but it was overruled by the Court.

The plaintiff then called one William Wood as a witness, who testified, that about a year before the trial he heard the defendant speak of the plaintiff in the highest terms. Here the testimony being closed on both sides, the counsel for the parties summed up the cause: and the presiding Judge having charged the jury, they returned their verdict for the defendant.

The plaintiff now moved for a new trial, upon the following grounds, viz :

I. That evidence tending to a justification of the words spoken and proved, cannot be given under the general issue. [7 Cowen, 630.]

II. That the words spoken and proved in the first count of the declaration are actionable, although said in the official capacity of the defendant, because they were maliciously spoken.

*Mr. Ogden Hoffman*, for the plaintiff, in support of these propositions, observed, that the cause of complaint at the trial was, that the Judge permitted the defendant to give in evidence under the

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general issue, circumstances which tended to prove the truth of the words spoken. These are to be found in the evidence of De Groot. This testimony took the plaintiff by surprise, because, not supposing that any evidence of the kind could be offered under the pleadings, he did not go into Court prepared to explain De Groot's testimony, which he easily could have done.

*Mr. Hugh Maxwell*, for the defendant, said, that the testimony of De Groot was not offered for the purposes of justification, but to rebut the presumption of malice. But he contended, that this action, upon general principles, could not be maintained at all under the facts proved at the trial. The information communicated by the defendant concerning the plaintiff, was furnished in his *public and official capacity*. He had a right to communicate to his official associates such facts relating to a subordinate officer as tended to his disparagement, and the defendant has not overstepped these limits. [He cited *Remington v. Congdon*, 2 Pick. R. 310. *Stark. on Slan.* 198. The Chief Justice here asked Mr. Hoffman if this position were not conclusive against the plaintiff?]

*Hoffman* in reply. The action can be maintained, if we show *express malice*. Words spoken which imply malice, may be explained by showing, that he who uttered them was in a public station, and spoke the words in his official character. That shifts the *onus* from the defendant to the plaintiff, and the latter must then show expressly that the defendant was actuated by malicious motives, and had no object of public good in view. Here the defendant was allowed to prove, not that his *motives* were pure, but that his *charge* was true. The plaintiff not being prepared to rebut the evidence, was fixed with a crime in the presence of the Court and jury, without the power of showing his innocence. Besides this, there was no proof that De Groot's information was ever communicated to Doctor Harrison. For these reasons we think a new trial ought to be granted.

OAKLEY, J. The only question raised at the trial was, whether the plaintiff had sustained any *special damage*, he having set forth such damage in his declaration, and having made it the foundation and gist of his action.

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Now it clearly appeared that the defendant *never was removed from his office*, and of course the whole cause of complaint vanished, unless the words spoken were actionable *per se*. It is not contended, on the part of the plaintiff, that the words charged in the second and third counts were so proved as to make it appear that the jury have found a verdict against the evidence on those counts: for the testimony of the plaintiff's first witness is explained, if not contradicted and destroyed, by that of the first witness on the part of the defendant. The words charged in the *first* count are clearly not actionable in themselves, and the plaintiff, to sustain his action, must prove special damage as the consequence of the words. He failed totally in his attempt to do this, and his action therefore cannot be maintained.

HOFFMAN, J. I concur in the general conclusion, that the plaintiff's motion must be denied; but I do not mean to say, that a public officer is screened in all cases by his official station from the consequences of slanderous charges, even if made in reference to his office, provided such charges *are false and malicious*. Here, however, the plaintiff has not shown such express malice on the part of the defendant, as would justify the Court in setting aside the verdict of the jury, and the motion must therefore be denied.

JONES, C. J. I shall not express any opinion upon the point last suggested; but I concur with my associates in their refusal to grant this motion, for the reasons which have already been given. The words *proved* are not actionable *per se*, and the plaintiff failed wholly in his attempt to show special damage. Neither is there any clear evidence of malice on the part of the defendant; and if we were to grant the position assumed by the

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plaintiff's counsel, it is not sustained by his proof, and the application for a new trial must be denied.

*Motion denied.*

[Hoffman and Tallman, *Att'ys for the plff.* W. P. Hawes, *Att'y for the def't.*]

### THE FULTON BANK OF THE CITY OF NEW-YORK

*versus*

LEWIS BENEDICT.

The Hudson Insurance Company of the city of New-York, on the 22d of October, 1895, through M. Spencer, their President, made a temporary loan of \$14,000 to the firm of Keeler and Rogers. As collateral security for this loan, the borrowers put into the hands of Spencer two promissory notes, one for \$15,000, and the other for \$10,000; each of which was signed by the *defendant*, (among others,) and payable twelve months after date to the order of Keeler & Rogers, and which notes were made, "as the *defendant* alleged, for their *accommodation*. K. & R. at the same time owed the Company about \$22,000 for other and anterior loans, made upon bills and notes which had been discounted by the Company for their benefit.

The terms upon which the Hudson Company usually made their discounts were these: The borrower took the amount of his note in bonds of the Company, bearing an interest of six per cent., which were made payable at a day more distant than that on which the loan would fall due; and at the same time the borrower paid to the Company in *cash* a discount of six per cent. on the note, together with a *premium*, at the rate of six per cent. per annum, on an insurance of a life or lives, during the running of the note; which life insurance the borrower was supposed to apply for; but no policy, in fact, was ever issued, and the rate of insurance was uniformly the same, without regard to the condition of the life to be insured.

When the aforesaid loan of \$14,000 was made, it was agreed between Spencer and Keeler, that the two notes which were put into the hands of the former should remain as a security for that sum, until a certain arrangement, which was then pending between other parties for a loan of \$50,000 in favour of Keeler & Rogers, should be completed, and then the \$14,000 were to be returned, and the notes given up. And it was also further agreed, that in case the loan of \$50,000

should *not* be raised, and the house of K. & R. should stop payment, the Hudson Company should hold the notes as security, not only for the \$14,000, but also for any *other debts* then due, or which might become due from K. & R. to the Company.

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The loan for \$50,000 was not effected; and on the 29th of October, the house of Keeler & Rogers stopped payment. Before this period, however, (to wit, on the 25th of October,) the two notes above mentioned were *exchanged* by the Company for two *other* notes executed by the same parties; one of which (the note in controversy) was for \$15,000, and the other for \$5000: but at the time of this exchange, nothing was said relative to the terms on which the new note should be held. Subsequently to this, (in the month of June, 1828,) the note for \$15,000 was transferred by Spencer to the Fulton Bank, under circumstances somewhat peculiar, and they instituted this suit thereon against the defendant, (one of the makers,) who set up usury (among other things) as a defence. The Judge, at the trial, (for the purpose of bringing up the question of law,) charged the jury that the note, although it might have been negotiated to the Hudson Co. to secure the payment of pre-existing usurious paper, was not therefore usurious in their hands. The jury having found a general verdict for the plaintiffs under this charge, the defendant tendered a bill of exceptions, and upon the argument, **IT WAS HELD**, that if on the discounting of the accommodation notes and drafts held by the Company on the 22d of October, the premium of six per cent. on life insurance was taken as a *cover* for exacting more than legal interest on those loans, these notes and drafts were *usurious*. *Held also*, that if the note on which the action was founded was made solely for the accommodation of Keeler & Rogers, and was negotiated by them to the Hudson Co. as security in whole or in part for such usurious paper, then the note itself was usurious and void. That these were questions of fact nevertheless to be submitted to the jury: and however strong the evidence might be, the Court had no right to determine them. A new trial, therefore, was granted upon these points, for the purpose of causing the questions of fact to be determined by a jury.

I. It *seems* that the note in question having been given to, or negotiated by, a Company, which, by its charter, had no banking powers, was void under the restraining act. II. But if not void by that act, as it was taken by the Hudson Company in a transaction not authorized by their charter, no action could be sustained on it by the Company. III. If the plaintiffs had notice, when they took the note, that it had been negotiated to the Hudson Company contrary to its charter, the illegality of the transaction could be set up against *them* as a defence.

IV. *Notice*.—What shall be considered as notice to a corporation is not settled; but under some circumstances notice to a *director* ought to charge the corporation,—as where the director acts as the agent of the corporation.

V. *As to extent of the recovery*.—The plaintiffs cannot in any event recover beyond the amount of their advance.

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VI. *Evidence*.—A witness cannot be asked, whether from his *personal knowledge* of an impeached witness, he would believe him under oath. The true rule is to inquire of the impeaching witness his means of knowing the *general character* of the witness impeached, and whether from such knowledge he would believe him under oath.

VII. If a witness' character is declared by an impeaching witness to be *bad* from some *particular cause*, an inquiry may be made into the origin of that opinion, for the purpose of enabling the jury to estimate it properly. [See the opinion of OAKLEY, J. upon these points.]

*Quære*. Whether Keeler (one of the persons for whose benefit the note was made and discounted) could be a witness to prove the usury?

THIS action was brought to recover the amount of a joint and several promissory note for \$15,000, made by Lewis Benedict, (*the defendant*) W. S. Dezeng, J. H. & E. S. Beach, Gilbert F. Lush, Gregory & Bain, Chandler Starr, Elias Mather & Co., Spencer Stafford, and H. and S. Stafford, in favor of Messrs Keeler & Rogers and endorsed by them to the plaintiffs. The note bore date the 22d of October 1838, and was payable twelve months thereafter to Keeler & Rogers, at the Fulton Bank.

The declaration contained two special counts upon the note, together with the common counts for money. The first count set forth the making of the note by the defendant and the other makers *jointly*, and then alleged a *joint* and *several* promise on their part to pay the same according to its tenor and effect. The second count described the note as having been made by the defendant *alone*, and each count averred a direct endorsement thereof by the payees (Keeler and Rogers) to the plaintiffs.

The defendant pleaded the general issue, and added a notice to his plea, setting forth, that the note described in the declaration was discounted by the "Hudson Insurance Company" for Keeler and Rogers, at a time when said company were a corporation created by an act of the legislature of the state of New-York, and that by their charter they had not any right, power or authority to trade, traffic, discount, or otherwise deal in promissory notes or other securities for the payment of money; and that therefore said note was inoperative and void in the hands of the



Hudson Insurance Company. The notice also stated that the note was passed by that company to the plaintiffs, and that the plaintiffs at the time it was so passed had full knowledge that it had been discounted by the Hudson Insurance Company, and that said company was a corporation which by its charter had no right to deal in promissory notes, and that therefore said note was void in the hands of said company.

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Upon these pleadings issue was joined, and the cause was brought to trial before Mr. Justice HOFFMAN, on the 13th of December, 1828.

At the trial the plaintiffs having offered the note upon which they had declared in evidence, and proved the signature of the defendant,—the endorsement by Keeler and Rogers was admitted without controversy. The defendant also admitted, that the interest upon the note from the time when it fell due down to the day of trial, amounted to the sum of \$2,260,36, and the plaintiffs thereupon rested their cause.

The defendant then opened his defence and called James Keeler, one of the payees and endorsers of the note, as a witness, when the plaintiffs objected to his competency, upon the ground, that as the defendant had avowed that one part of his defence would rest upon the statute against usury, this witness could not testify as to the *origin* of the note, he having brought it into circulation by putting his name upon it. This objection was overruled by the presiding Judge, and the plaintiffs excepted to his opinion.

The plaintiffs then objected to Keeler as a witness, upon the ground that he was interested in the event of the suit, and to prove that interest, introduced in evidence two assignments, one executed by the firm of Keeler & Rogers, and the other by Keeler & Mather, wherein they had conveyed the whole of their property to certain individuals to secure to their creditors the payment of their demands, but reserving to themselves the residue, if any there should be, and the note in question was one of the debts secured by the assignment.

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To remove the *apparent* interest of the witness, the defendant then offered to prove that the property assigned was not sufficient to cover the claims of the *first class* of creditors named in the deeds, *by forty thousand dollars*. This testimony being objected to by the plaintiffs, was overruled by the Judge, and the defendant excepted to his opinion. The defendant then exhibited a release executed by Keeler, wherein he conveyed to the assignees named in the deeds, all his interest in the assigned property, and all claim to any residue reserved therein: but the counsel for the plaintiffs still insisted on their objection to the competency of Keeler, upon the ground that his interest *could not be released*. The presiding Judge, however, overruled the objection, and the plaintiffs excepted to this opinion.

Keeler being sworn, testified, that the house of Keeler and Rogers, (consisting of himself and Jedediah Rogers,) was established in the city of New-York, and transacted business there during the year 1825. That the house of Keeler & Mather (consisting of Jasper S. Keeler and J. G. Mather) was at the same time established at Albany, and these persons were partners, although they transacted business at different places. Of the signers of the note, one, (Dezeng,) resided at Geneva, two, (J. H. & E. S. Beach,) at Rochester, and the others at Albany, and all these parties were customers of the house of Keeler and Rogers.

On the 22d day of October, 1825, the witness being at the time a director in the Fulton Bank, applied to that bank for a loan of \$50,000, and laid before the board of directors two notes, one for \$15,000, and the other for \$10,000, signed by Dezeng, Benedict, J. H. & E. S. Beach and H. & G. Stafford. These notes (which were dated on the 22d of October, 1825, and made payable twelve months after date to Keeler & Rogers, or order, at the Fulton Bank,) were not offered for discount, but were to be used as collateral security for a temporary advance, until a note for \$50,000 should be brought down from Albany: and upon this last, the loan was to be founded. This note was also to contain other names, besides those last above mentioned, and Benedict left New-York for Albany on the morning of the 22d of October,

to obtain those names, the note for \$50,000 having already been signed (as the witness thought) by the persons whose names were upon the two notes first presented to the bank.

The board of directors seemed willing to accommodate the witness with the loan, although they were not disposed to act upon the matter that day; but the witness stated to them, that it was necessary for his house to have money immediately to save them from stopping their payments. Mr. M. Spencer, (who was president of the Hudson Insurance Company, and a director also in the Fulton Bank,) was present at the board, when Keeler made his application for the loan, and he signified to the witness privately, that he would furnish him with whatever money Keeler & Rogers might want for that day, and told the witness that the Hudson Insurance Company would take twenty thousand dollars of the loan applied for at the bank, if he would take half of it in the bonds of the Hudson Company. The witness replied that it *would cost too much*, but offered to take five thousand dollars in said bonds. He afterwards, however, stated to Spencer, that if he would furnish him with \$14,000 in cash he would take the *residue* (\$6,000) in bonds. Spencer having acceded to this proposition advanced to the witness \$14,000, by a check of the Hudson Company on the Fulton Bank, and received from him the check of Keeler & Rogers for a like sum on the same bank as a receipt for the money. The witness also delivered to Spencer the two notes, (amounting to \$25,000,) which were to be left with him until the defendant (Benedict) returned from Albany. There was no specific arrangement made relative to the note for \$50,000, but Spencer was to have an interest in it to the amount of \$20,000.

Benedict returned from Albany on the 24th of October with the note for \$50,000, which was executed by the same persons who had signed the note *now in controversy*. It was payable to Keeler & Rogers or order, at the Fulton Bank, one year from date; but the bank finally declined to discount it after it arrived. It being intimated, however, that the bank would take a part of the loan if the name of a Mr. James were upon the note, Benedict went again to Albany to procure his signature. He returned on

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the 26th or 27th of October, bringing with him \$20,000 in money which James had loaned, for the benefit of the parties concerned in the matter, and three notes, one for \$15,000, (the note now in suit,) one for \$5,000, and one for 10,000. This last note, however, was never used in any way. The witness and Benedict went to the office of the Hudson Company the morning after the return of the latter from Albany, when Benedict took up and destroyed the two notes, (amounting to \$25,000,) which had been lodged there by the witness, and left with Spencer in lieu of them the note now in question, and a note for \$5,000, in all respects like the other, except as to amount. Nothing was then said about the bonds. On the 29th of October, the witness called at the office of the Hudson Company, to complete the business and receive his bonds for the balance of the loan ; but Spencer being engaged, stated that they were not then made out. Nothing however was mentioned at this time about *life insurance*.

The bonds which the witness expected to receive, were bonds of the Hudson Company, payable six months after date. These bonds drew interest, and were, by agreement between the witness and Spencer, to be taken *at par*, although they were at that period at four and a half per cent. *below par* in the market.

The counsel for the defendant here asked the witness what was *understood by the parties*, as to the arrangement to take \$6,000 in the bonds of the company. To this question the counsel for the plaintiffs objected : but the defendant's counsel insisted that it was a proper question, inasmuch as by former transactions of a similar character between the parties the taking of bonds might have acquired a *conventional meaning*. The Judge, however, sustained the plaintiffs' objection and the defendant excepted to his opinion.

The witness further testified, that all the preceeding notes were made for the sole purpose of raising money to carry Keeler & Rogers through their difficulties. On the 28th of October, Mr. Spencer loaned to the witness \$3,000, out of his own pocket, for his accommodation, and this sum was never returned, as the house of Keeler & Rogers stopped payment on the 29th of that month.

The *defendant* knew nothing about the arrangement made by the witness relative to the bonds, as he did not deem it expedient to communicate those facts to him. Nothing, however, had been said, up to this period, about a *life insurance*. This was the substance of Keeler's testimony, and upon it the defendant rested his cause.

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The plaintiffs then called Mr. Spencer as a witness, who testified, that he first took his seat as a director in the Fulton Bank on the 22d day of October, 1825, and on that day he found Keeler at the bank applying for the loan of \$50,000; that the Hudson Company had an interest in sustaining the credit of Keeler & Rogers, and he, therefore, (the witness,) finding that the bank were not likely to act on Keeler's application, immediately offered to advance to that house the sum of \$14,000, until they could raise the \$50,000, before spoken of by Keeler.

The terms of the arrangement between the witness & Keeler were, that Spencer should advance to Keeler & Rogers \$14,000, on the two notes first before mentioned, until the negotiation for the loan of \$50,000 was completed, and when that money was raised the advance of \$14,000 was to be repaid, and Spencer was to surrender up the two notes. If the loan of \$50,000 was not effected, and Keeler & Rogers stopped payment, then Spencer was to hold the two notes as security, not only for the \$14,000 advanced, but for any other sums which Keeler & Rogers then owed or might thereafter owe the Hudson Company. The company at this time held a good deal of Keeler & Rogers' paper which was falling due.

The witness then asked Keeler whether he had a right to dispose of the notes, and being informed that he had, the witness called into his presence Joseph H. Cunningham, the Secretary of the Hudson Ins. Co., and repeated the terms of the agreement to him in the presence and hearing of Keeler. The notes were then endorsed by Keeler, and Spencer gave him the Company's check on the Fulton Bank for \$14,000, and received in return the check of K. & R. for a like sum. Subsequently it was ascertained, that the Bank would not make the loan of \$50,000, and on the 25th or 26th of October, Spencer loaned to K. & R. \$10,000

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for their accommodation, which sum was repaid on the 27th without interest. When this sum was repaid, Keeler and Benedict were both present, and the defendant applied to Spencer to exchange the two notes held by him for the note in controversy, and the other note for \$5000, before described by Keeler. This exchange was then made, but the witness heard nothing of bonds until the 27th, when Keeler asked the witness if the Hudson Company would not take the notes *absolutely*; offering at the same time to take one half of their amount in bonds. This proposition was declined by Spencer, and Keeler never called for any bonds in connexion with the agreement for the advance of \$14,000, and nothing was said about *interest*, although the witness expected to charge it. The money was to be returned when the loan of \$50,000 should be obtained, and this loan, it was expected, would be effected in a few days. On the 28th of October, Keeler applied to the witness for a loan of \$3000, and the witness advanced that sum to him without any stipulation as to interest, receiving the check of K. & R. in return, payable on the 29th; but Keeler & Rogers stopped payment on the 28th, and this sum was not repaid.

The witness further testified, that it was no part of the agreement that there should be a substitution of notes, and when the exchange was made, nothing was said about a continuance of the loan. When K. & R. failed, they owed the Hudson Company about \$18,000, exclusive of the advances of \$14,000 and \$3000 before mentioned. The agreement in relation to the loan made on the 22d of October was, that in case K. & R. went on with their business, then they were to repay the loan of \$14,000, and take back the notes deposited; and this was to be done as soon as the loan of \$50,000 was effected.

On his cross-examination, the witness stated that it was also a part of the agreement, that if the advance of \$14,000 was not repaid, and Keeler & Rogers did not go on with their business, then the notes were to remain as security for any further claim which the Company might have upon that firm. Nothing was said about bonds or interest, and no part of the loan was to be made in bonds.

The witness was then asked by the defendant's counsel what were the usual terms of loaning money in the Hudson Ins. Co.'s office, in reference to the compensation taken for loans. This question being objected to on the part of the plaintiffs, the objection was sustained by the Judge, and the counsel for the defendant excepted to his opinion.

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The defendant's counsel then put a variety of questions to the witness relative to other transactions, and to the testimony given by him in another cause, which are not deemed material to a correct understanding of this case. But on further cross-examination, the witness stated that he was a director of the Fulton Bank from the 22d of October, 1825, until July, 1826. That the Bank became possessed of the note in question in February, 1826, having at first received it as collateral security for a loan of \$10,500, made to the witness on his own note, payable in 60 days. When this last note came to maturity, the witness paid \$500, and gave the Bank a new note for \$10,000 on the same security. Subsequently, in June, 1826, the Bank made a settlement with the witness, and as he thought, surrendered up his note to him, receiving in exchange the note now in suit.

The witness became a director in the Hudson Insurance Company in February or March, 1825; but the Company was incorporated on the 4th of April, 1811. [See the Acts of that year, as the act of incorporation made a part of the bill of exceptions.] One branch of business pursued by the Company, was the making of loans in their own bonds. They also effected some insurance against fire, and some on vessels; but the witness did not know that the Company ever issued a policy on a life insurance, although he thought they did issue *one* to a person in Delaware county.

The Company usually transacted their business in the following manner. When a loan was applied for, the Company took a note for the amount, and issued a bond to the applicant, payable three months after the note would become due, which bond bore an interest of six per cent., payable quarterly. The borrower, at the time of his application for the loan, also applied for insurance to the amount of the note on a life, until the note fell due.

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The Company charged a discount on the note of six per cent., and a premium of six per cent. on the insurance also, which was paid by the borrower *in cash* when the loan was made. This was the usual mode of transacting business, and it was rarely departed from.

The witness also testified, (among other things,) that on the 22d of October, 1825, K. & R. owed the Hudson Insurance Company about \$22,000, on notes and bills discounted for them by the Company, of which \$18,000 still remained due and unpaid. These notes and bills which were specifically described by the witness, were all discounted by the Company for K. & R. in their usual way of doing business, and the notes and bills were all made for the accommodation of K. & R. When these notes were discounted, the Company's bonds were given in exchange for them, and these bonds were under par; but the discount of six per cent. and the premium of six per cent. for the life insurance, were paid by the borrowers in cash.

The plaintiffs then called Cunningham as a witness, and he corroborated the statements of Spencer, as to the terms of the loan and the agreement made with Keeler in his presence.

The plaintiffs then also called Joseph Ketchum as a witness, who was a Director in the Fulton Bank in October, 1825. His testimony tended, in some degree, to corroborate that of Spencer, in relation to the loan, but it is here omitted as unimportant to the history of the cause.

The plaintiffs having here again rested their cause, some testimony was introduced by the defendant to support the evidence of Keeler. The plaintiffs then also produced testimony to the same point. They also offered in evidence the assignments made by K. & R. and Keeler & Mather for the benefit of their creditors, for the purpose of showing, that the note in question was not an accommodation note, but was given on good consideration, and for that purpose these assignments were admitted and made a part of the evidence in the cause. The first assignment was an indenture bearing date on the 22d of October, 1825, between Keeler & Rogers and Keeler & Mather of the first part, and E. S. Beach, W. S. Dezeng, Lewis Benedict, Peter Bain, Spencer



Stafford, Chandler Starr and Elias Mather, of the second part. It recited, that J. H. & E. S. Beach, Lewis Benedict, W. S. De-  
 zeng and others, had *that day* executed and delivered to the parties of the *second* part, as a loan, their joint and several note for \$50,000, &c. ; that the parties of the *first* part were *indebted* to the persons who had signed said note, *in some of them* ; that the persons who had signed said note, or some of them, had also incurred liabilities for the parties of the first part, by drawing, endorsing and accepting bills, drafts or notes not then due ; that the parties of the first part, for the purpose of indemnifying the persons who had signed said note of \$50,000, and who had or should have claims against the assignors on account of the said other notes, drafts or bills, " and in order to provide a fund for the ultimate satisfaction thereof," had assigned and transferred unto the parties of the second part " the outstanding debts, sloop and other property and effects" thereafter mentioned and specified for that purpose, &c. The assignment then provided, that if the note of \$50,000, or any part of it, should remain unpaid when it came to maturity, that then the parties of the second part should appropriate the property assigned, in the first place to the satisfaction of said note, and then to pay and satisfy all such sums of money as were then due from the assignors to any of the persons who had signed said note, or which might be due to them or either of them when said note should come to maturity, for or by reason of the drawing, accepting or endorsing said other bills, drafts or notes, or the renewal thereof, &c. If there chanced to be a *surplus*, after paying or satisfying said claims, then said surplus was to be paid over to the assignors. [There were also other covenants not material to this cause, which are here omitted, and the foregoing is a mere sketch of the assignment.]

The second assignment bore date on the 29th of October, 1825, and was made between the same assignors of the first part, and Dezeng, Beach, Benedict, Bain and Russell C. Wheeler, of the second part. It recited, that the parties of the first part were indebted unto certain individuals, (confidential creditors,) whose names were set forth in two schedules attached to the deed and marked B and C ; that being desirous of providing for the pay-

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ment of these debts, she parties of the first part conveyed to the parties of the second part, all their estate, real and personal, wheresoever situated, in trust, in the first place to make good the provisions of the said first assignment, (which was particularly referred to,) if the same should not be satisfied out of the property therein conveyed. In the second place, "to pay off, satisfy and discharge all such debts" as might be due or owing to the persons whose names were specified in the schedules B and C, and then to pay over the surplus, if any, to the assignors.

Several witnesses were then called on the part of the defendant, for the purpose of showing how the Bank became possessed of the note in suit, and one of them, (Mr. Leavitt, the former President of the Bank,) testified, that it was discounted by the Bank upon his (Leavett's) application, without the knowledge of Spencer. That Spencer was largely indebted to the bank at the time, and had agreed that any paper belonging to him, found there, should be held by the bank as security for his debts. The witness found the note in the bank in June, 1826, and having been informed by Spencer that he had advanced \$14,000 upon it, the witness caused it to be discounted for that sum, and the amount was carried to the credit of Spencer. The check of K. & R. for \$14,000, was also received by the bank from the Hudson Company, subsequently to July, 1826, and Spencer then informed the witness, that the check was given for the \$14,000, advanced on the note for \$15,000.

The defendant then called William P. Rathbone, as a witness, who testified that he was a director in the Fulton Bank, during the year 1825, and during the first quarter of the year 1826. The note in question, was first presented by Spencer to the directors, as collateral security for his own note of \$10,000. A committee was appointed to examine and report upon the sufficiency of the security offered by Spencer, and the witness was one of that committee. The witness knew that the Hudson Insurance Company made K. & R. a loan, after the Fulton Bank refused to make one on the notes offered. He was aware of this, when the note in question, first came into the bank, and he supposed it to be a part of the paper offered by K. & R. The matters in relation to it

were the subject of conversation at the board of directors ; but the witness knew not whether all the directors heard it or took part in it. -

The defendant then, for the purpose of impeaching the testimony of Spencer, by showing discrepancies in his statements, offered in evidence, his (Spencer's) testimony, taken on his examination in Chancery, on the 19th of April, 1828, in a cause wherein the present plaintiffs were complainants, and E. S. Beach and others were defendants : and several portions of that testimony were read to the jury for that purpose, and also to establish other facts.

The counsel for the defendant then called several witnesses to impeach the character of Spencer ; and the counsel for the plaintiffs called many others of the most respectable standing, who spoke in unqualified terms as to the fairness of Spencer's character for truth and veracity.

One of the witnesses was asked by the defendant's counsel, whether, judging from the general character of Spencer and his own knowledge of him, he would consider him entitled to credit under oath. The plaintiffs objected to this question, on the ground that the witness had no right to take his own knowledge into the account in forming his opinion as to the credit of the witness. His honor the Judge decided that the question was improper, and the counsel for the defendant excepted to this opinion.

It appeared that the impression against Spencer had been excited by his connexion with the Green-County-Bank, which had failed, and from his being implicated in the prosecutions instituted against various individuals for conspiring to defraud certain institutions, &c., commonly known here as the "*Conspiracy Cases*." [See *Covens Rep.* vol. 9 p. 578.] And the plaintiffs having called Mr. Murray Hoffman as a witness, he testified in favour of Spencer's general character for truth and veracity ; but on his cross-examination, he testified that Spencer's general character, without limiting it to the matters of truth and veracity, was bad. Being asked by the Judge, whether he founded his testimony as to the general character of Mr. Spencer, on what he had heard of him as connected with the conspiracies before mentioned, Mr.

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Hoffman answered that he did principally ; and thereupon the Judge decided, that the testimony given by the witness on his cross-examination, was inadmissible, and rejected the same: to which opinion and decision the counsel for the defendant excepted.

After the testimony had been closed, the counsel for the defendant, before arguing the questions of fact to the jury, insisted before the court, that if the plaintiffs were entitled to recover at all, they were not entitled to recover more than fourteen thousand dollars, with interest thereon from the twenty-second day of October, eighteen hundred and twenty-six, when the note became due. First, because the plaintiffs had only discounted it for that sum. Secondly, because the plaintiffs were trustees, either for Mr. Spencer or the Hudson Insurance Company, for all beyond the fourteen thousand dollars and the interest thereof; and as neither Mr. Spencer nor the Hudson Insurance Company could recover on the note, the plaintiffs ought not to be allowed to recover as trustees for them. But the Judge decided that the plaintiffs, if entitled to recover at all, were entitled to recover the whole amount of the note: for this court could not look into nor regard the rights of their *cestui que trusts*, and he should so charge the jury; to which opinion the counsel for the defendant excepted. The counsel for the defendant further insisted, that if the contract for the negotiation of the notes in question to the Hudson Insurance Company was as stated by Mr. Keeler, then there was *usury* in it, and the note was void: and if the contract for its negotiation was as stated by Mr. Spencer, then it clearly appeared that the note in controversy, and the five thousand dollar note accompanying it, were negotiated to *secure paper*, which was *usurious* and void, and was *itself therefore void*: and insisted that his Honor the Judge ought to charge the jury, that if they were satisfied that the note in question was taken to secure *usurious paper* belonging to the Hudson Insurance Company, and known to be *usurious* to their President, Mr. Spencer, when he received the note in question, then they should find a verdict for the defendant. And the counsel for the defendant insisted on this view of the subject the further, because a part of the *usurious paper*,

the payment of which this note was negotiated to secure, was made by the same parties as those to the note in question. The Judge stated that this appeared to be a serious question : and as there was no dispute about the facts, he should decline to charge the jury on the subject ; but for the purpose of bringing up the question, he decided, that although the note in controversy might have been negotiated to the Hudson Insurance Company, to secure the usurious paper referred to, still it was not void ; to which opinion the counsel for the defendant excepted.

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The counsel for the defendant also insisted before the court, that notice to any of the directors of the Fulton Bank, at the time the note in question was received by said Bank, that it had been negotiated to the Hudson Insurance Company, was sufficient to charge the Fulton Bank with notice of that fact. But the Judge decided that notice to one or two of the individual directors of that fact was not sufficient to charge the Bank with knowledge of it : to which opinion the counsel for the defendant excepted. After these decisions and exceptions, his honor the Judge stated to the counsel that he should put only two questions of fact to the jury, viz : First, whether the note in question was negotiated and delivered to the Hudson Insurance Company on a corrupt agreement to take their bonds, which were under par, in part payment, for the purpose of covering usury. And secondly, whether the Fulton Bank, when they received this note, had notice that it had been negotiated at and to the Hudson Insurance Company : and that he should put this last question to the jury for the purpose of bringing fairly before the court the question whether the note was valid or invalid in the hands of the plaintiffs ; and to bring that question fully before the court he should decide that the negotiating of the note to the Hudson Insurance Company, unless usurious, did not render it invalid ; to which opinion the counsel for the defendant excepted. These questions were discussed by the counsel for both parties, at great length, and on this examination the counsel for the plaintiffs used the examination in chancery of Mr. Spencer, to establish facts unconnected with his impeachment.

The Judge charged the jury in substance as follows :—That he had already declared his opinion, that if the plaintiffs were entitled

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to recover at all, they were entitled to recover the whole amount of the note ; that he had also for the purpose of bringing up the question, decided, that if the note in controversy was taken in part to secure usurious paper, still that circumstance did not make it void ; and that if it had been negotiated to the Hudson Insurance Company, yet if that fact was not known to the plaintiffs when they took the note, it was good in their hands. That he should present for their decision, two questions of fact. The first one was important and difficult. It regarded the terms on which the note was negotiated to the Hudson Insurance Company : and on it the witnesses Messrs Keeler & Spencer, were at issue. It was simply this : whether it was a part of the arrangement between Mr. Keeler and Mr. Spencer on the twenty-second day of October, when this note was negotiated to the Hudson Insurance Company, that a part of the amount should be paid in Bonds, which were under par with a view to cover an usurious agreement or not. If they believed Mr. Keeler, then they ought to find a verdict for the defendant ; and if Mr. Spencer, then for the plaintiffs. That these witnesses both appeared to be respectable men, and he had no doubt both intended to speak the truth ; but they unhappily differed, and it was for the jury to decide between them. That on this point he felt it his duty to state to them, that no man ought to suffer for imputed offences, of which he had been acquitted, and on that account, he had, in the course of the trial, decided that Mr. Spencer's connexion with the conspiracy trials, ought not to be received as evidence to impeach his character as to truth and veracity. It had been decided by the highest tribunal of this state, that the alleged conspiracy was no offence. The whole community on that occasion was excited on the subject, and it was the duty of courts of Justice, to protect individuals from suffering unjustly : it was his duty to state that the defendant had failed in impeaching Mr. Spencer, and the jury were to lay out of view all impressions as to general character formed from Mr. Spencer's connexion with the conspiracy cases. The question for the jury to decide, as to the credibility of Mr. Spencer, was whether he was entitled to be believed under oath.

His honor further stated to the jury, that if they should decide the question he had just put to them in favor of the plaintiffs, then there was another question to which he wished them also to respond : which was, whether the Fulton Bank, when they received this note, had notice that it had been negotiated at and to the Hudson Insurance Company. That he should give them no particular instructions relative to the *kind* of notice, which the bank ought to have, further than what he had before stated—that notice to individual directors of the bank was not notice to the corporation, unless the proof went further, and showed that the directors had made the communication to the board or to the officers of the bank ; but he should leave the question broadly to them as he had already stated it.

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Under this charge the jury retired ; and thereupon, the counsel for the defendant excepted to the charge of the Judge, so far as it related to the amount to be recovered ; so far as it related to the question, whether the note was usurious by reason of its having been taken in part to secure usurious paper ; so far as it related to the general character of Mr. Spencer as derived from the conspiracies, and so far as it related to the notes not being void in the hands of the plaintiffs, unless they knew when they took it that it had been negotiated to the Hudson Insurance Company ; and because his Honor omitted and declined to instruct the jury, that notice to the individual directors of the bank was notice to the bank itself.

The jury afterwards came into court with a general verdict for the plaintiffs, for seventeen thousand two hundred and sixty dollars and thirty-four cents. After the verdict was recorded, the Judge inquired of the jury, how they found the fact, as to notice to the bank, of the note's having been negotiated to the Hudson Insurance Company ; to which question, the jury answered that they found, that the bank took said note without such notice.

*Mr. S. A. Foot*, on the part of the defendant, now moved for a new trial, and contended,

I. That proof, that there was not sufficient property embraced by the assignments of Keeler & Rogers and Keeler & Mather

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to pay even the first class of their creditors, was inadmissible. to show that Keeler, the witness offered by the defendant, had no *real* interest in the controversy, by reason of the residuary trust in the assignments in favour of the assignors. An interest (he contended) to exclude a witness, must be direct and certain. Loss or gain in *money*, specific and inevitable, must result to the witness by the event of the suit, in order to exclude him. In this case, Keeler *could not* have an interest in the event of the suit; for he did not stand *within an hundred thousand dollars* of a possible interest. He was an utter bankrupt. All his property embraced by the assignment would not be sufficient, by \$40,000, to indemnify those creditors, who were in the most favoured class, and he could not by a possibility have any interest in the termination of the cause. True it is, the witness was afterwards admitted by the force of a release, but the defendant ought not to have been compelled to resort to that expedient, because the credibility of his witness might be, and probably was, affected before the jury by the course pursued.

II. If an "agreement to take bonds" on a contract of loan, had acquired a *conventional meaning* between the officers of the Hudson Insurance Company and Keeler & Rogers, by reason of previous dealings and similar transactions, such conventional meaning ought to have been disclosed, for the purpose of ascertaining what the contract was, as understood by the parties to it.

Where *words*, in any business, have acquired a specific meaning, parol proof may be introduced to show what that meaning is. [*Astor v. Un. Ins. Co.* 7 Cowen R. 202.] The "taking of bonds" in point of practice, had this meaning, namely: whenever a loan was made by the Hudson Insurance Company, instead of giving *money* to the borrower, they furnished him with their own bonds, payable at a future day. When these bonds were issued, a discount of six per cent. was deducted from their amount, and the borrower was also charged with a life-insurance of six per cent. upon the sum borrowed, although in point of fact no life insurance was ever effected. By this means, the Company, in point of fact, received twelve per cent. interest; their contracts



were usurious, and the life insurance was a mere cloak to cover the unlawful practice. The defendant ought therefore to have been permitted to prove what the "*taking of bonds*" signified in this course of dealing.

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III. It was proper to inquire what were the usual terms on which the Hudson Insurance Company loaned money, for the purpose of testing the accuracy of Mr. Spencer's memory, (he being a witness for the plaintiffs, and contradicted by Mr. Keeler,) as to the terms of the loan in question. If the defendant had been permitted to *prove* the terms upon which the Hudson Insurance Company usually transacted their business, it would have turned the scale in his favour before the jury.

IV. A witness called to impeach the general character of another witness, may, after having testified that his general character is questionable, use his own knowledge of him on the question, whether he would believe him under oath. There is no specific rule laid down in the books, to point out the manner in which a witness may be impeached; but the English rule will be found in *Starkie*, part 2. 146, 147. [See also 1 *Phil. Ev.* 212. *Swift's Ev.* 143. *Note to Stark.* 146-7.]

From these authorities (said Mr. F.) I deduce two questions, which may be put concerning the witness sought to be impeached. 1. What is his general character? and if the answer be that it is bad, then, 2. Would you believe him under oath?

The last question is given by the English rule. As to general character *for truth*, a man who is perfectly worthless in every moral sense, may have no character upon the point, one way or the other. But the English rule is not extensive enough, for the answer comes from the private opinion of one person only, and that person may be prejudiced. If the first question be put, and the answer cast suspicion upon the witness, then the second may be put also. In this case, the witness was asked, if Spencer's character for truth and veracity was not bad? He replied, "*it was some time since.*" He was then asked, if he would believe him under oath? This question was excluded by the Judge, and the defendant claims the right to put it. If a man's character be good,

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no witness ought to be permitted to say that he would not believe him; and a man of good character will be always ready to vindicate his reputation.

V. General character consists of reputation acquired by particular transactions, and if one be excluded, then another may, and then all; and thus a character decidedly bad may be protected from exposure.

I dissent from the law as laid down by his honour the presiding Judge, in relation to the testimony of Mr. Hoffman, the witness; and from his sentiments also. The public have long since determined against the sentiments; and I trust this Court will against the law. If the rule laid down be correct, then the most infamous man may escape impeachment.

VI. The Hudson Insurance Company or Mr. Spencer is entitled to the balance due on the note over and above the \$14,000, (with interest,) for which the Fulton Bank discounted it: and if neither of them could recover that balance on the note, then the plaintiffs ought not to be permitted to recover for their benefit.

The previous points relate entirely to the application for a new trial; but this part of the defence comes directly to the merits of the cause. It is perfectly clear that the rights of the plaintiffs cannot be superior to those of the Hudson Insurance Company, or Spencer. That is, as the plaintiffs have taken Spencer's or the Hudson Company's claim subordinate to his or their rights, they cannot in any event, recover beyond the sum of \$14,000, and the interest on that sum. True it is, an endorsee may sue for the benefit of other persons: but if his character of trustee be disclosed, then the same defence which would prevail against the principal, may be set up against the trustee. [*Denniston v. Bacon*, 10 J. R. 198.]

VII. The note in question was made solely for the accommodation of Keeler & Rogers, and *accommodation paper*, taken to secure the payment of usurious notes or bills, is *itself usurious*, and particularly so if made by the same persons, who made the usurious paper. If these notes were void in the hands of the

Hudson Insurance Company, they were clearly void in the hands of the Fulton Bank. It is proved by the witness of the *plaintiffs*, (Spencer) that Keeler & Rogers were indebted to the Hudson Insurance Company, anterior to the date of the loan for \$14,000, and prior to the making of the note now in question. When Spencer made the advance of \$14,000, it was made upon the security afforded by the two notes, which amounted to \$25,000; and the agreement between the parties was, that these notes should stand pledged not only for the *advance*, but also to secure the payment of the pre-existing debts. When the two notes last mentioned, were taken up by the defendant, he placed the note in controversy, together with the note for \$5,000, in the hands of Spencer, in lieu of the two first notes, and they were to be held upon the terms under which the first notes were deposited.

As the notes in question were merely substituted for other notes, and subject to all the terms of the agreement applicable to the first notes, they stand in the place of these last, and are obnoxious to every objection, which could have been made to the first notes. They take the place of the first notes in every particular, and were to be held by Spencer or the Hudson Company, not only to secure the advance of \$14,000, but as security also for any other debts, which Keeler & Rogers might owe the company. True it is, they were subject to a contingency, to wit: the contingency of a failure in business, on the part of the borrowers. But that contingency has happened, and the claims of the company to the two notes *last* deposited, have been asserted in courts of justice.

The contingency was not of a nature to put the lenders in any hazard of their debt, but on the contrary, the advance of \$14,000, was to be secure at all events, and the company were to hold the difference between the advance and the amount of the two notes for *other* demands, which they had, or might have upon Keeler & Rogers. If these gentlemen had continued to carry on their business, then there would have been no necessity for holding the notes on the part of the company, because the *advance* of \$14,000, was to be returned out of the loan for \$50,000, and Keeler & Rogers would have been able to meet their engage-

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ments with the company, as their demands became due and payable.

It stands clearly proved then, that Spencer or the company was to hold the two notes last deposited, as security, not only for the advance, but for the other claims, which the Hudson Company had against Keeler & Rogers. It becomes now necessary to show, what those *other* demands were, and if it can be proved that they were usurious and void, then *every part* of the agreement was void, and payment of this note cannot be enforced. [*Harrison v. Hannel*, 5 Taunt. 780.]

Spencer has testified, that the debts which were contracted by Keeler & Rogers with the company, anterior to the time of the advance of \$14,000, were contracted upon the same terms with the other debts, which were contracted with the company for loans; or in other words, those *other* debts of Keeler & Rogers, were for loans made to them by the Hudson Company. And how were those loans made? In cash? No, but in the bonds of the Hudson Company, payable at a future day. These bonds were neither cash nor the representatives of cash. The borrower, who was compelled to receive these bonds, took them at their par value, when in point of fact, they were from 4 to 6 per cent. below par. In other words, whenever he gave his notes to the company for an hundred dollars, he received that in return, which produced to him but ninety-five or six dollars. In addition to this losing bargain, six per cent. for discount was deducted from the amount of the bonds at the time of the loan, and six per cent. more upon the same sum for an insurance upon *the life of the borrower during the period of the loan!* And these two last exactions,—these *twelve* dollars in the hundred, were to be paid in cash at the time of the loan!

If an insurance upon the life of the unfortunate borrower had been *in fact* made, ~~there~~ would at least have been some little plausibility for the claim. But Spencer swears that such insurances were never made, and at all events, they were not made in the case of Keeler & Rogers.

What, then, are we to call this loan? Is it a fair and bona-fide transaction, or a screen to hide unlawful dealings? The borrower

paye twelve per cent. for his money in discount and insurance, while he receives *nothing* but a *loan* of the Company's bonds. It were a sufficient extortion to take from him lawful interest upon bonds, which were themselves below their par value; but what are we to call the transaction, where an interest of twelve per cent. is charged upon a loan of *paper*, which, when sold, produces to the borrower but ninety-five dollars, for each hundred dollars he assumes? I think it is but a device, and a poor device to take unlawful interest, and the covering is too thin to conceal any part of the corrupt transaction. The contract, therefore, is entirely void; every part of it is tainted, and no part of the notes can be collected. They were given as security for a corrupt agreement; they are the pledge of usury; they are unlawful, and therefore utterly void in the whole, and in every part. No portion of their amount can be collected, and even if the Hudson Company can recover of Keeler & Rogers the amount of their advance in proper actions, still this note is void, and can never be collected. It was in the first place a mere accommodation note, and having been used for corrupt and unlawful purposes by the payees, the makers are not bound, either legally or morally, to pay it. These plaintiffs, in point of fact, had little right to this note at all. It belonged, in fact, to the Hudson Company, if to any body, because that Company made the advance upon it. Spencer never furnished a dollar of the loan, and had no just claim to the note. But he, it seems, was indebted to the plaintiffs, and they *finding* the note in their office, very kindly discounted it for Mr. Spencer, by passing \$14,000 to his credit! The plaintiffs have never been prejudiced by the note at all; they have paid no value for it; they have advanced no money upon it. Their credit to Spencer can be reversed, when it is proved that he had no right to the note, and then it would go back to its true proprietors. The plaintiffs, therefore, have no claim to sympathy, and as the note they hold was given for an unlawful purpose, to secure a usurious debt, it is void.

Mr. Foot also cited to this part of the case, the following authorities, viz: [*Tuthill v. Davis*, 20 J. R. 285. *Cuthbert v. Haley*, 8 Term R. 392. *Jackson v. Henry*, 10 J. R. 195. 3 Com. Law. R.

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237. *Preston v. Jackson*, 2d *Starkie R.* 237. *Harrison v. Hammond*, 5 *Taunt. R.* 780.]

VIII. The Hudson Insurance Company not being authorized to do banking business, or any other business than that appertaining to insurance, the negotiating of the note in question to that Company, under the circumstances stated in the bill of exceptions, rendered it void. They had no right to issue bonds for the purpose of effecting loans to borrowers: they were not incorporated for any such purpose, and their acts in these particulars were in violation of the restraining act. Cases perfectly analagous, which have been fully settled by Courts of the highest authority here, have put the question upon this point at rest. [*Laws of 1811. ch. 154. p. 34. 2 R. Laws, p. 234. vol. 4. Laws 40. Sess. ch. 242. 41 Sess. ch. 236. Utica Ins. Co. v. Hunt, 1 Wend. R. 56. People v. Bartow, 2 Cowen, p. 290. Sturgess v. The Utica Ins. Co. 8 Cowen, p. 20. 15th Johns. R. p. 383.*]

IX. If this note is not void by the restraining act, still it is void in the hands of any party having notice of its negotiation to the Hudson Company; and we contend that the plaintiffs had notice in this case. Notice to individual directors of a corporation, is notice to the corporation itself; especially if those directors are charged with the particular business in question.

Spencer was a director in the Fulton Bank, and had a perfect knowledge of the manner in which the note in question came into existence, and all the purposes for which it was negotiated. He himself tainted the note with usury, and Rathbone, who was a director, had full knowledge of the fact that the note had been passed to the Hudson Company. A committee was appointed to examine the security offered by Spencer, when he applied for his loan of \$10,500: that committee examined the security, and of course must have known from whence the note was derived.

There is nothing in the books upon this subject to guide us, as there is no decision to point out what is notice to a corporation. But it will never do to say that a corporation has no notice of facts, of which *each one* of its directors is fully aware. If the communication were addressed directly to the Bank, it would of

course come before the directors, and before them only. Now, when two of the directors have knowledge of all the facts attending an application for a particular loan, that ought to be deemed a sufficient notice to the corporation; for it was their duty to communicate those facts to the board. At all events, there was enough to put the Bank on inquiry, and they are neither innocent, nor *bona fide* holders without notice.

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*Messrs D. B. Ogden and J. Hoyt* for plaintiffs.

I. Keeler was an incompetent witness.—He was interested to defeat this claim, for if it were defeated, he would owe nearly \$20,000 less; and the trust premises in that case would go to pay other debts for which it was admitted he was liable; and though there might be no surplus to come to him, yet he would be exonerated from debts to which the trust property would be applied.

Here then was the direct interest, which the counsel for the defendant contends the witness must be exempt from.\* Though he might not gain any thing which would go into his pocket, he might and would in this case, if the defence prevailed, gain by reason of *keeping* that in his pocket, which was already there.

II. The inquiry of what was meant by terms used in conversation, was an improper inquiry, because the parties would differ as to the meaning. The inquiry is, or ought to be, as to "what was said," and the court and jury are to determine the meaning. You may give evidence as to the meaning of "terms of art" but not as to ordinary conversation, by which a parol contract is formed.

There is no such thing as a "conventional meaning" given to the language of persons, except in cases of such general and universal use, as to have become known in the community, to such an extent, as that courts will take notice of such meaning, and give to it the solemnity of a usage. Any contract the parties may have made before, could have no connexion with the one in question, unless reference was expressly made to it. The case of *Astor v. The Union Insurance Company*, was an insurance upon hides and

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skins. The question there was a question of *usage*, and forms the exception we have adverted to.

III. The inquiry for the reasons stated in this proposition was equally improper. You cannot test the accuracy of a witness, or impeach a witness in this manner. Stark, on Evid. [*part 2. page 134.*] shows this rule as we state it. But the bill of exceptions does not put the question on this ground.

IV. The rules of evidence on this point are too well established to be overturned to meet the convenience of a particular suitor. The question is, "what is the general character of the witness for truth and veracity?" [*Stark. part 2, page 145, 146. Swift, 143.*] The general character cannot be formed on the knowledge of one individual or two. The character of the purest man in the community might, in this manner, be impeached; for there is none so pure as to be exempt from personal enemies; no man can be the enemy of another whom he thinks honest, and therefore, if one is called upon to testify as to the character of that enemy he must speak of him, if he tells the truth, as a man unworthy of confidence. Chapple had already stated he would take the oath of the witness. He had then in forming his opinion, taken into consideration his own knowledge, as well as the knowledge of others.

V. We admit general character consists of reputation acquired by particular transactions. But we add, it does not become general if confined to one person. There is, however, an answer to all the points and suggestions. The Judge submitted the question of character to the jury, and the counsel for the defendant had the benefit of all the prejudice he could raise out of the conspiracy cases, and the jury passed upon it all, and found the witness not only unimpeached, but unimpeachable, and that must end the enquiry, for this suit at least.

VI. This is the first question presented by the defendant's points of any importance. The Hudson company advanced on the 22d



October, 1825, to Keeler & Rogers \$14,000, on this note which then had one year to run. The interest for that year was \$980, so that the amount the company would be justly entitled to, when the note arrived at maturity, would be \$14,980. But this suit is against the drawer of the note, and he is liable to pay the whole amount upon the happening of either of two conditions.

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1. That it was founded upon a consideration.

2. If not founded upon a consideration, that it passed to an innocent holder, upon consideration, without knowledge of its origin, and before it became due.

We contend that both these contingencies occurred. It was founded upon consideration as between the makers and payees, and the latter could have sued and recovered. [*Munn v. Commission Co.* 15 J. R. 55.]. The Hudson Company paid a valuable consideration, as did also the plaintiffs; and as against the drawers of the note, it is not a matter of fit inquiry what the plaintiff gave for it. It is enough that they took it before it was due, and paid value for it.

VII. If this proposition of the defendant be true, it does not affect our right to recover. The note in question was not made or taken to screen usurious paper. We do not deny the authority of the cases cited by the defendant's counsel, but we contend they have no application to this case. The advance of the \$14,000 was a temporary advance, to be returned in a few days, and nothing was said about interest or bonds, or any thing else which could be tortured into a corrupt agreement.

VIII. The verdict of the jury, on the finding of the fact, submitted distinctly to them by the Court as to the knowledge of the Bank when they took this note, that it had passed through the Hudson Company, relieves us from the necessity of looking into the charter of that company. The charter does not make the note void, if the company had not consented to take the note, and the Bank having taken it without knowledge, are entitled to recover. But it is said the note is void by reason of the restraining acts of 1804 and 1818.

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The act of 1804 applies to the *creation* of a fund for three purposes, *issuing notes, receiving deposits, and making discounts*. The fund must not only be *applied* to these purposes, but it must have been *created* for the purpose of being so applied. Where the fund has been so created, to constitute an offence against the statute, it requires the application of it to all the combined purposes material in the act. So we understand the opinion of Mr. Justice SUTHERLAND in the case of *The Firemen's Ins. Co. v. Ely*, [2 Cowen, 702.] and this is the effect of the decision in *The Utica Ins. Co.'s case*. [1 Wend. R. 56.] There is no proof in this case of the creation of the fund for the purposes mentioned in the act, and no proof of the application of the fund. There is no pretence that the Hudson Company ever received a deposit; they certainly issued no bills; they made no discounts. Their operations were exchanges of bonds for other paper connected with a life insurance, which the charter gave them the right to do. It is true, the habitual use of a fund for any given purpose, is evidence that the fund was created for that purpose. There is no proof of their ever having loaned money. The money advanced to K. & R. was not a loan; it was an advance without a contract for interest or compensation, and the transaction did not assume that shape for the purpose of "cheating the law," or evading the statute, but it was to confer a benefit, without reward. The act of 1818, imposes a penalty, and nothing more. It makes nothing void; and if its phraseology is broader than the act of 1804, it harms us not. The case of the *People v. Barstow* was under that act, and therefore is not an authority against us. The Court can impose no greater penalty than the statute inflicts. When a statute imposes a penalty, the remedy is a forfeiture of that penalty, and nothing more. [*De Wolf v. Johnson*, 10 Wheat. 392.]

IX. The Judge at the trial put the question on the true ground. The jury have passed upon it as a question of fact, and that fact cannot again be disturbed. The knowledge of Spencer was not notice to the Bank. He did not act in that negotiation with the Bank as a director of the Bank, but as a contracting party in another interest.

JONES, C. J. THIS was an action by the plaintiffs, as endorsees of a joint and several promissory note for \$15,000, payable twelve months after date, to the order of Keeler & Rogers, at the Fulton Bank, against the defendant, one of the makers of the note. It was an accommodation note, made by the defendant and others, at the request of Keeler & Rogers, for the sole purpose of relieving that house from the immediate pressure of pecuniary difficulties, which threatened to overwhelm them. This note, with another similar note for \$5,000, having the same time to run, created by the same makers, at the same time, and for the same purpose with the note in suit, were negotiated by Keeler, to the Hudson Insurance Company,—an incorporated company deriving its powers and operating under a charter granted by the legislature of the state of New-York,—and by that company the larger note for \$15,000, now in suit, was transferred to the Fulton Bank, the present plaintiffs.

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The defence to the plaintiffs' right to recover upon the note, was opened, as resting upon these two general grounds : first, that the note was usurious and void ; and secondly, that the discount of it by the Hudson Insurance Company, and its subsequent transfer from that company to the plaintiffs, were in violation of the statutory provisions of the law of the state, usually denominated the restraining act ; or if not in contravention of that statute, were unauthorized by the act of incorporation of the Hudson Insurance Company, and was in either case illegal, and the note for that reason inoperative and void as a security in the hands of the Hudson Insurance Company ; and that the plaintiffs being, as they are alleged to be, chargeable with notice, at the time of the transfer to them, of the previous history of the note, no action could be sustained upon it by them.

The course taken at the trial, for the support on the one side, and the refutation on the other, of these general grounds of defence, gave rise to other questions, chiefly questions of evidence, which, so far as they may be material to a correct understanding of the views I have taken of the merits of the defence, will be noticed in their order. First then, was the defence of usury sufficiently sustained by admissible evidence to preclude or bar the plaintiffs' right of recovery upon the note ? The witness called

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by the defendant to prove the fact of usury was James Keeler, one of the payees and endorsers of the note. His competency was called in question by the plaintiffs, who objected to him on the ground that a party whose name is upon negotiable paper, and who has contributed to its circulation, as a good and available security, shall not be afterwards allowed to testify as a witness in subversion of its validity by proving that it was, in point of fact, polluted with usury at the time he gave it the sanction of his name; but the objection was overruled, and I think correctly.

The question of the competency of a party to negotiable paper to prove it usurious in its origin, has undergone much discussion, and received different determinations at different times, wholly irreconcilable with each other. In this state the leaning of the courts was for many years strongly against the competency of the witness, under such circumstances, to testify, and during that period, the current of decisions took that direction; yet the question was still treated as unsettled. But after floating for some time in uncertainty, it has finally been settled by our Supreme Court, that a party to negotiable paper, who is not disqualified by interest, may testify to facts which show the note to which he has given the sanction of his name to be polluted by the taint of usury. Thus in the case of *Waters v. Powell*, [17 John. 176.] that court held, that a party to a negotiable note may be permitted to testify to any facts arising subsequently to his becoming a party to the note, which does not involve his own turpitude, and if the note receives its taint when it is negotiated to the party who discounts or otherwise acquires it by the facts then happening, the witness would be at liberty to disclose those contaminating facts.

The distinction taken by the decision in this case, between the corrupt agreement, which enters into and pollutes the note in its original concoction, and the taint it may receive in its negotiation after it is perfected as a security, to the party who discounts it, may be supposed to reconcile the principle of the decision, with the rule previously insisted upon as the law of the court. But in the more recent case of the *Bank of Utica v. Hilliard*, [5 Cowen 153.] that distinction was disregarded, and it was broadly ruled by the court, that the maker of a negotiable note was an admissible witness to prove that the note was originally given for a usu-

rious consideration : and so long as these decisions remain in force, the rule must be considered as settled in favor of the competency of the witness.

But another objection was taken to Keeler as a witness, on the ground of interest. To sustain this objection, the plaintiffs introduced the two assignments mentioned in the case, from Keeler & Rogers, and Keeler & Mather, by which the whole of the property of the assignors was assigned to trustees to secure their creditors, who, with the exception of the makers of the \$50,000 note, were arranged into two classes (the one preferred to the other) for the payment of their debts, the assignors reserving to themselves the residue, if any there should be. The first assignment was of part of the property for the exclusive benefit of the makers of the note for \$50,000, and the second assignment gave that note the preference to both classes of their creditors. And it appeared, and was admitted, that the note in question was one of the debts secured by the assignment, and entitled to the preference given to the note for \$50,000, which was to be first paid. On these facts the plaintiffs insisted that Keeler was interested in the event of the suit. To obviate the force of the objection, the defendant offered to prove that the whole of the property covered by the assignment was insufficient to pay the first class of creditors by \$40,000. This evidence was rejected, and an exception taken to the opinion of the judge on the point. The defendant then offered a release from Keeler, acknowledged in open court, granting and releasing to the trustees named in the assignment, all his interest in the assigned property, and in the residue reserved to the assignors. The counsel for the plaintiffs still insisted on their objection to his competency, on the ground that his interest could not be released ; but the judge was of opinion that he was admissible, and overruled the objection. To this opinion, the counsel for the plaintiffs excepted ; and our next inquiry in order, will be, whether the exception taken by the defendant to the decision of the judge against the relevancy of the testimony offered by him, or that taken by the plaintiffs to the admission of the witness, upon his release to the trustees, can be sustained.

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First, was the proof offered by the defendant, that the property embraced in the assignments was insufficient to satisfy the first class of creditors sufficient or material to show that the witness had no interest by reason of the residuary trust? It is difficult to conceive how the answer to this question, considering the course the cause took, can be material to the defendant: for the witness released his interest in the residuary trust, and was on that ground admitted to testify. The defendant has had the full benefit of his evidence; and the notion, that the credit of the witness suffered by the imputation of an interest, to which the Court gave its countenance, by requiring a release to extinguish it, appears to me too refined and unsubstantial to form the basis of a judicial decision. And even if the Judge erred in excluding the proof, and thereby sustaining an objection to the witness which that proof would obviate, yet the objection being removed by other evidence, and the witness admitted to testify, the error became harmless, and it would be against the settled rules of the Court to disturb the verdict for that cause. But the Judge was right; for the testimony offered by the defendant did not obviate the objection. It might have shown in a striking point of view the apparently remote and illusory prospect of a residuary fund, and the seemingly forlorn hope of benefit to the witness from that source; and from these premises, a cogent argument might have been drawn against the probable influence of such a valueless and mere nominal interest upon the witness to swerve him from the truth. But the fact of the interest, such as it was, would still remain. It was a direct interest in a fund which was contemplated as possible, at least, to exist, and which the witness himself had reserved as a substantial or expected benefit, we are to presume, to him. The general rule of evidence is to exclude a witness having a direct interest in the event of the suit, as incompetent, without regard (except in special and peculiar cases) to the value and importance of that interest to the witness; and this case does not come within any exception to the rule. We are not at liberty to speculate upon the influence which a greater or less degree of interest might have upon the witness. It is sufficient to exclude him that he has a direct interest which may be available to him.

Here the objection to the witness was the interest he had in the contingent residue of the trust funds reserved to the assignors, which his testimony tended to disencumber of the charge of the note in question. The assignments were sufficient *prima facie* evidence of the residuary interest of the witness in the trust-premises, to disqualify him until the objection was removed. The most obvious and effectual course was to extinguish that apparent interest by release. It would be dangerous, and withal most inconvenient in practice, to allow the party calling the witness to repel the evidence of interest resulting from the assignments which are his own acts, and speak his own language, by an exposition of the property and debts embraced in the deeds, and proofs, and estimates of the values of that property, in order to ascertain the probable results of the trusts, and the chances of a surplus. Such an ordeal for testing the interest of a witness in a surplus fund, would partake too much of an *ex parte* inquiry to be consistent with even-handed justice. It would, moreover, be open in every stage of it to exception, and lead to interminable and vexatious controversies, and it would seldom end in any satisfactory result. The items composing the stock in trade, which mercantile houses, on the eve of insolvency, assign for the security and benefit of those they wish to favour, usually consist of merchandise more or less unsaleable, and outstanding demands against debtors of different degrees of responsibility. The actual values and probable avails of such items, seem to be mere matters of opinion, and with the exception perhaps of flagrant cases, approaching to fraud, the estimates of them will seldom be satisfactory or sufficiently certain to exclude all chance of a surplus in every possible turn of events.

This may be a strong case; but even in this case, the sources from whence the residuary fund was to flow, had not been exhausted. The assigned property was still in the hands of the trustees, and desperate as the defendant represents the hope of a surplus to be, the witness may have been under very different impressions. It is not unusual for the insolvent, who is familiar with the property he assigns, and too apt to be sanguine in his hopes and expectations of favourable dispositions and avails, to retain

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his confidence in the full payment of the debts he secures, long after his trustees and creditors have lost all hope of satisfaction from the trust estate. Yet the insolvent, if he believes in the sufficiency of the fund to yield him a surplus, will be governed by that supposed interest, as being a real and substantial benefit to him.

But again: why resort to an argumentative refutation of the charge of interest from the inadequacy of the fund, or the insufficiency of sources to create it, when a far more simple, direct, and satisfactory answer would be given by the release of the witness on the stand? When a witness is called to testify, and the tendency of the evidence will be to create, disencumber, or increase a fund of which he may be entitled to partake, it must be conceded that the best and most satisfactory answer to the objection to him on that ground, is a release of his interest in the fund. It effectually extinguishes all possibility of benefit to him from that source, and silences all his hopes and pretensions, whether well or ill founded, to any present or future advantages to himself from the result of the fund, in any possible turn of events or change of circumstances. And it seems to me to follow, from this acknowledged operation of the release, which it is always in the power of the witness to give, that the defendant, who showed no obstacle in the way of attaining it, was bound, if in his power, to produce such a release from this witness, and could not substitute for it the proof he offered. It is manifest that he had the power to produce the release, for in the sequel he did produce it. Yet he chose to put himself upon the weak ground of an offer of proof to show a deficiency of the assigned premises to satisfy the debts, as conclusive against all possible interest in the witness.

The considerations to which I have referred, satisfy me that the resort to that species of proof to repel the charge of interest, was inadmissible. It was an argumentative and inconclusive answer to the objection, substituted without necessity, for the more efficacious and decisive refutation by the release of the witness; and the proof, moreover, which was offered, however clear and convincing it might be to others, could not divest the witness of any interest or possibility of interest he might have, or suppose and believe himself to have, in the trust estate under the residuary



trust in his favour, and the consequent avoidance of the note in question, as a charge upon that estate. These interests, real or imaginary, would be reached by the general release of the witness himself, and could not be otherwise extinguished. The exception of the defendant to the exclusion of the proof he offered, is of course untenable.

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But, secondly : Did the release itself fully restore the witness to competency to testify, or were the plaintiffs still well founded in the objection to which they adhered ? The object and operation of the release was to restore the competency of the witness, by removing all temptation to diminish the debts, for the purpose of increasing the residuary fund in which he was to participate. It did extinguish all the interest he could possibly have in any such residuary fund, and so far it operated to remove the objection to his competency. It did not exonerate him from his liability to the plaintiffs as endorser of the note in question. But his engagements, as endorser, did not expose him to the objection of interest ; for the endorser is not answerable over to the makers of the note in case of a recovery against them ; and if his testimony should defeat the suit of the holders against the makers, the record in that suit would not be evidence for him in a subsequent action against himself ; and the holders in such subsequent action (his oath no longer standing in the way) would recover against him, unless he could establish the usury by other proof. But this was an accommodation note, created by the makers at the request and for the accommodation of Keeler & Rogers, the endorsers, and negotiated by them for their own benefit. It was to be paid by them. They, by their assignment, recognised it as a debt of their own ; acknowledged their obligation to pay it, and made provision for such payment. They stand, therefore, as regards liabilities between them and the defendant, on the footing of makers, and the testimony of Keeler tends directly to the discharge of a debt which he was bound to provide for and to pay. He was bound to defend the makers of the note in the suit of the holders upon it, and to indemnify them against its results. He would consequently be answerable over to the defendants in an action adapted to the case, for the amount of the recovery against him, in the event of

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the ultimate success of the plaintiffs in the suit; and from that liability, as regards the cost at least, his own testimony is to shield him. The verdict which his oath would secure to the defendant would not operate to discharge the note, nor be an available defence for him in an action upon it by the holders against him. The holders, in their suit against him, would recover simply the amount of the note with interest; but the recovery over of the defendant, after a verdict against him by the holders, would subject the witness to the costs also of the previous suit against the original defendant. From these costs, his own evidence in this suit undeniably had a direct tendency to protect him. His release to his assignees could not reach that ground of interest, and if it be such as the law will regard as substantial, it must disqualify him. If, therefore, the objection taken at the trial to his continuing interest, was upon that ground, and was sufficiently pointed and explicit, he ought to have been freed from that badge of interest, or to have been excluded; and if improperly admitted to testify, his evidence ought not to be allowed its weight in the scale against the plaintiffs' verdict.

But the objection to the competency of the witness, after his release to his assignees, was general and indefinite, and the reason assigned for it was, that his interest *could not be released*. Could such an objection be fairly understood to refer to his liability to the costs of the suit? Did it either expressly or implicitly point to that liability as the ground on which it rested? And if that liability was the interest to which the plaintiffs intended to object, was not the cause they assigned for their objection delusive and calculated to mislead? was the liability to the costs of the suit, an interest which could not be released? The witness was offered by the defendant, in whom alone the right to the remedy over for the costs of the suit against him resided, and he might surely have extinguished that right by a release, or by a suitable covenant and indemnity, if a formal release would, from any cause, be ineffectual against any resort or recourse by the defendant, in the event of judgment against him, to the witness for the costs of the suit. And if, therefore, the responsibility of the witness for those costs, in an action against him by the defendant,

was the true ground of the continuing interest, to which the objection was intended to apply, it might have been removed, and if it had been disclosed at the trial, would most probably have been obviated. How then could the plaintiffs, if they referred to that liability as the ground for persisting in the objection, be warranted in representing it as an interest which could not be released? It was in the power of the defendant himself to discharge the witness from it, and as he seems to have supposed that his defence rested solely upon the testimony of that witness, he could not have hesitated to exercise the power he possessed to remove the impediment, if aware of its existence, which obstructed his competence to testify, and if in fairness the plaintiffs were bound to disclose the true ground of their objection at the trial, and to apprise the defendant that the ulterior responsibility of the witness to the defendant for the costs of the suit was the continuing interest to which he objected. As he withheld the disclosure at the trial where the objection might have been obviated, it may be questionable whether he ought to be permitted to avail himself of the benefit of the exception here. I state it, however, as an open question upon the whole objection of incompetency, by reason of liability for costs: and as the views I have taken of the general merits of the application before us for a new trial, render that question of minor importance in this cause, I shall forbear to express any decided opinion upon those points I conceive it to present, and to which I have thus fully adverted.

But if the testimony of Keeler was properly admitted, does it prove the fact of usury? the substance of his evidence bearing upon the question, was that his co-partnership being pressed by pecuniary embarrassment which threatened to overwhelm them, Benedict the defendant, and other customers and friends of their establishment, agreed to aid them, with a credit of \$50,000, to enable them to raise the funds their necessities required. That application was made by him (Keeler, who was one of the directors) to the Fulton Bank for a loan upon this credit, by the discount of a note for \$50,000, payable in twelve months at the Fulton Bank, to be drawn by the parties who were to befriend him, in favor of Keeler & Rogers, and to be negotiated by them

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for their use and accommodation, and that to provide for the immediate wants of the house, a further application was at the same time made by him to the board of directors, for a temporary advance until the note for \$50,000, should be obtained, for which advance, two notes, one for \$15,000, and the other for 10,000, then laid before the board, signed by some of the parties who were to be the makers of the note for \$50,000, were offered as collateral security. That the board of directors appeared favourable to the loan, but not disposed to act upon the matter that day; that he (Keeler) represented to them that his house must have an immediate advance of money to save them from the necessity of stopping their payments. He does not inform us what reply, or whether any reply was made by the board to this appeal; but he observes that Mark Spencer a co-director of the bank, and then the president of the Hudson Insurance Company, who was present at the time, signified to him privately, that he (Spencer) would furnish the money the house of Keeler & Rogers might want for that day, and told him that the Hudson Insurance Company would take \$20,000, of the loan applied for by him at the bank, if he would take one half of it in the bonds of that company. That those bonds were at that time at  $4\frac{1}{2}$  per cent. below par. That Keeler objected to the proposition, that it would cost too much, but offered to take \$5000, in bonds. That he afterwards proposed to Spencer, that if the lenders would furnish him with \$14,000 in cash, he would take the residue, \$6000, in bonds, to which proposition Spencer acceded. And it was, thereupon agreed between them, that \$20,000, of the proposed loan of \$50,000, should be taken by the Hudson Insurance Company, that \$14,000, should be advanced by the lenders in money, and the residue, \$6000, be taken in the bonds of that company at par. That in pursuance of this agreement, \$14,000, was advanced to him, (Keeler) and he deposited with Spencer the two notes which had been offered to the bank, and which were to be left with him until the loan for \$50,000, should be consummated. That after the note for \$50,000, had been obtained, the application to the bank, for the discount of it was declined; but that the loan of the Hudson Insurance Company was, nevertheless, con-

tinued, and the note for \$50,000, having been exchanged for other notes of smaller amount, but with the same parties for makers and endorsers, two of the smaller notes, one for \$15,000, being the note now in suit, and the other for \$5000, were substituted for the notes for \$25000, temporarily deposited with Spencer on receiving the advance of 14,000, as aforesaid, and were received and accepted by Spencer as the stipulated security for the loan of \$20,000, from the company to Keeler, and the two notes temporarily deposited with him, given up and cancelled. Keeler further stated that he, on the 29th October, called at the office of the Hudson Company to complete the business and receive the bonds for the balance of the loan, but that Spencer said that they were not then made out. The house of Keeler & Rogers stopped payment the same day, and it does not appear that any bonds ever were issued or delivered to them or to Keeler, for the balance of the loan.

The usury then, which infected this loan, if it was usurious, consisted in this feature of the agreement, that \$6000, of the consideration was to be taken in bonds, at par, which were at that time, at  $4\frac{1}{2}$  per cent. below par in the market; and if we are to take for granted, (the case being silent on this point,) that the discount, or interest at the customary rate was deducted from the notes for \$20,000, for the twelve months they had to run, and that the  $4\frac{1}{2}$  per cent. upon the bonds, was in addition to the regular discount of the notes, there would be a semblance of usury in the transaction. But if the defence of usury had rested upon that circumstance alone, I should hesitate to sustain it; because I feel the force of the answer to the objection, and cannot well see how the Hudson Insurance Company are to be charged with usury on that ground, since their bonds carried interest, and they were bound to pay the full amount of them and could not profit by the discount at which they were sold in the money market. The borrower, if he must turn the bonds into money, will lose the discount, and by that operation receive less than a purely cash loan would give him. But how do the lenders benefit by that operation? They pay the full consideration for the notes they discount in money, and their own bonds at par carrying interest.

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In what sense can they be understood to exact or receive more than at the rate of legal interest for the use and forbearance of the loan they make? If the agreement to take the bonds, was merely nominal, and the real contract had been that this discount of 4½ per cent. should be returned by the lenders, and the full proceeds of the bonds after that deduction paid to the borrowers, instead of the delivery to them of the bonds; or if the company was in the habit of purchasing up the bonds they issued, at the market price, and such purchases and sales were to be effected at the office of the company, and that operation was understood to make part of their course of dealing; and if it was averred in general terms that such purchases and sales were to be effected at the office of the company, these considerations might peradventure give to the agreement a different aspect from that which it now wears. But of this there is no evidence in the case. If, therefore, the fact of usury had been left upon the testimony of Keeler, I should strongly incline to coincide with the jury in their verdict against the defence on that ground. I observe, however, that the counsel for the defendant inquired of this witness what was *understood by the parties*, as to the arrangement to take \$6,000, in the bonds of the company; and insisted that the question was proper, inasmuch as, the taking of bonds by previous dealings, and similar transactions might have acquired a conventional meaning. The plaintiffs objected to the question, and the Judge sustained the objection.

It was certainly competent to the defendant to prove by this witness the agreement under which notes were discounted, or the loan upon them contracted. And if in settling and adjusting that agreement between them, reference was had to any general regulation or course of dealing for the rates of discount, or of interest to be charged to the borrowers; and the witness, by his own previous knowledge on an explanation at the time, was apprised of the terms, which such regulation or course of dealing would prescribe, and gave them his assent, they became a part of the contract and were capable of proof by the witness. He was fully examined to the agreement, and if the defendant was not satisfied with his explanations, he had it in his power to pursue the

enquiry. But the question to which the plaintiffs objected, did not point to the agreement or any fact or circumstance within the knowledge of the witness. It enquired of him, in substance, what the parties understood by the arrangement for taking bonds for the six thousand dollars of the loan; and upon the supposition that the question was pointed to this particular loan, the parties intended by it must have been the witness himself and Spencer. But the witness had already testified to his own exposition and understanding of the arrangement, and had affirmed it to be, that the bonds which were at 4 1-2 per cent. below par in the market, were to be taken by the borrowers at par. The question could not be expected to draw from him any other answer; and if he had sworn to a different understanding, or ascribed a meaning to the terms of the arrangement relative to the bonds, inconsistent with the sense of them admitted by his previous examination, he would have discredited his own evidence, and have shown himself unworthy of belief.

As respects his understanding, therefore, the question was unnecessary; still if it had been put to him in legal form, and the nature and real terms of the arrangement made the subject of inquiry, instead of his understanding of what the arrangement was, it might have been admissible, and though superfluous, not improper. But it went further, and inquired of the witness what Spencer's understanding of the arrangement was, which clearly transcended the bounds of legal evidence. The witness might testify to the agreement made by Spencer with him, and the terms of the loan as settled between them; but he could not testify to the understanding of Spencer not embodied in the agreement, nor made part of it, as to the arrangement between them relative to the bonds; for he could have no knowledge of any such understanding, otherwise than by the information of Spencer: and it must be conceded, that he could not testify to the point upon that representation. Indeed, it would be difficult upon any acknowledged rule of evidence, to sanction the interrogatory or to permit it to be answered. The words it would profess to interpret, are perfectly intelligible, and express a clear, distinct, and rational meaning, in all respects well suited to the arrange-

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ment to which the witness applied them, and entirely consistent with the tenor of his general testimony. He obviously used them in their ordinary sense, to explain the terms of the loan as agreed upon between Spencer and himself. The grievance he complained of, was the loss his house must sustain by the sale of the bonds he was to take at par, which were at the time at 4 1-2 per cent. below par in the market; hence his objection that the loan, if the half was to be paid in bonds, would cost too much. He knew that the necessities of his house must force the bonds immediately into market for sale, and he was of course desirous, in negotiating the loan, to reduce the amount of bonds he was to take. There is no intimation in any part of his testimony of any other dissatisfaction with the terms of the loan, or of any hidden or secret condition or usurious contract covered by the arrangement for taking the bonds. There is no room, therefore, for explanatory proof of the meaning of the phrase.

But the defendant insists that the question was proper, because the words might, by previous dealings and similar transactions between the parties, have acquired a conventional meaning, and the case of *Astor v. The United Insurance Company*, [7 Cowen, 202.] is cited to show that where words in any trade or business have acquired a specific meaning, parol evidence may be introduced to show what that meaning is. That case was decided upon the doctrine of the usage of trade, and the point decided was, that the phrase, "usage of trade," applies in respect to that class of merchants who deal in the article. Words by known usage of trade, or by long and habitual use of them, in a peculiar sense, by any particular class of men, do acquire a technical or specific meaning peculiar to the class who use them in that sense, and differing from the ordinary acceptance of them by the public at large. And in such cases parol evidence is, from necessity, admissible whenever they are used in the technical or peculiar sense, to prove the fact of the usage, or habitual use of the words in such peculiar sense of them, and the specific meaning they have thereby acquired. But this is not a case of usage, or of words acquiring a specific meaning by the long and habitual use of them by any class of merchants or traders in a sense peculiar to themselves. It



is indeed vindicated as an analagous case, supported by the same principle. But what just analogy is there between them? The specific meaning ascribed by the defendant to these words, is by his own admission confined to the Hudson Insurance Company and its dealers, and he traces back its origin no further than the commencement of the monied operations of that institution.

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The defendant himself does not claim for the phrase any specific meaning as impressed upon it by usage, or long and habitual use of it, in a sense peculiar to itself. It is a conventional meaning that the words are alleged to have acquired. What are we to understand by the conventional meaning of words? Must it not be the meaning which the parties who use them, mutually agree, for reasons of their own, to affix to them, as the sense in which, in dealings between themselves, they are to be understood? How then does a convention between the lender and borrower of money differ from an agreement between them as to the terms of the loan, or the phraseology by which those terms shall be expressed or signified? And to charge or affect these borrowers with a signification of words materially differing from their ordinary and popular sense, as being the conventional meaning of them, must they not be parties to the convention by which that peculiar and unusual meaning was affixed to those words? Or if the peculiar signification ascribed to them has been acquired by the long, uniform, and habitual use of them by the lenders in the negotiation of their loans with their customers, must not the borrower be first charged upon proper evidence, with knowledge or notice of that peculiar signification of the words employed in describing the arrangement, before he can be held to have contracted his loan in reference to it, or to have given any consent, express or implied, to the terms which the words, when used in such peculiar meaning of them, would import or signify? If so, any conventional meaning the words in question may have acquired, which could have any bearing upon the terms of the loan, must have resulted from an agreement between the immediate parties to the contract, or from the assent of the borrowers to the terms and rates of discount and loans established by the company, in their dealings as lenders, and fully known or explained to the

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borrowers at the time, as the regulation to which they were to conform.

The conventional meaning of the phrase, "taking of bonds," according to the defendant's exposition of it, was acquired by the practice of the Hudson Insurance Company, and in its course of dealing; and a broad and most artificial signification is ascribed to it. The words are alleged to signify, that in all loans by that company, the bonds of the company are to be taken by the borrower instead of money, and that a discount of six per cent. is to be deducted from the whole nominal amount of the bonds, and the borrower is also to be charged with a life insurance at a premium of six per cent. upon the sum borrowed: a signification purely artificial, and entirely foreign from the natural meaning of the phrase, and indicating terms of the loan which the words could by no possible construction be made to express; and which borrowers, not possessed of the key to the secret conventional meaning of them, would not understand them to imply. And, admitting that the Hudson Insurance Company had established a system of rates and terms of discounts and loans, upon which, in their course of dealing, as lenders of money, they acted and required others to observe, and which the phrase in question was understood by them and their regular dealers to signify, must not those facts be known or explained to the applicant, and the rates and terms of the loan required by the course of dealing of the lenders, receive the assent of the borrower, to make the arrangement and the signification of the words employed to express it, conventional between them and binding upon him? These facts, then, and the terms upon which the notes were negotiated to the insurance company, were the material points to which the defendant,—especially upon the direct examination of his own witness,—was, by the rules of evidence, to apply his interrogatories, to elicit the truth of the transaction which he professes to have had in view.

But the question put to the witness was, what the parties (referring to himself and Spencer,) understood by the arrangement for taking the \$6000, in bonds: and it was insisted upon as a proper question, on the ground that those words might, by

former transactions of a similar character, between the parties, have acquired a conventional meaning, which the defendant ought to be permitted to show. This was the principal question upon which the Judge passed. Now it seems to me, that a preliminary objection occurs to this course of inquiry, which was decisive against its admissibility. It was not shown that there had been any former transaction of a similar character, or any previous dealings whatever between those parties, nor was the witness interrogated to that point. The question put to him could not even be regarded as the first link in a chain of proof to establish the terms of the loan, which the phraseology of the arrangement between the parties is said to indicate. Keeler was the only witness, who had been examined, and his testimony up to the time that this question was propounded, and indeed throughout, was confined to the single negotiation, in which this loan originated. The foundation, therefore, on which the defendant builds his right to interrogate the witness to the conventional meaning of the words in question, was not so laid as to authorize the step he proposed to take. There could be no previously settled conventional meaning of words between parties, who had never had occasion to employ them in any monied operation before. The defendant, before he could be entitled to an answer to his question, was bound, upon his own principles, to establish the fact of former similar transactions, or previous dealings, by which the words used by the witness could have acquired the conventional meaning, which he was required to testify.

But if in point of fact the words in question had, and were known to the witness to have, the signification ascribed to them by the defendant, and he, with such knowledge, contracted in reference to that signification of them, then the agreement he entered into with the company was in conformity with the terms which these words in that special or peculiar meaning of them imported. And he was subject to a direct examination to the point, and must have answered to proper interrogatories, as to the actual agreement as it was finally arranged, and in fact subsisted between them. His own knowledge on this subject and the real and true nature and terms of the contract, and actual

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rates of the discount or loan he effected, however disguised, and whatever token, artifice or device may have been employed to conceal and cloak them, he was bound to disclose. He might have been subjected to the scrutiny of a strict examination and the most searching interrogatories, to elicit from him the truth. But the rules of evidence required that the enquiry should be directed to the development of the facts and circumstances of the case, and the terms of the arrangement and agreement for the discount of the notes, and the disposition to be made of the residue beyond the advance upon them. And I am satisfied, from the views I have taken of the question put to the witness, enquiring into the understanding of the parties, as to the arrangement for taking the \$6000, in bonds, that it was not admissible, and was properly overruled.

The arrangement, as explained by Keeler, was a simple operation of discount, on terms not unfavourable to the borrower unless the condition of the \$6000, made them so; but the words employed in describing that arrangement, as expounded by the defendant, unfold to us new and different terms of a most grave and impressive character. None of these harsh conditions appear in the arrangement or agreement as described by Keeler. He not only observes an unbroken silence touching them, but so far as he was examined to the point, he denies and disproves that they enter into or qualify the contract. Before the objectionable question was proposed, he had stated that when he applied for the bonds for the \$6000, nothing was mentioned about life-insurance, and after that question had been overruled, upon his further examination, he testified in answer probably to a more direct and pointed question, that nothing had been said up to the time of the failure of his house, (which was after all negotiation was at an end,) about a life-insurance. He positively affirms too, that \$14,000, was advanced upon the two notes in money, and the residue or \$6000 only, of the amount, left to be paid in bonds;—features of an agreement entirely dissimilar from those which would belong to the arrangement which the supposed conventional meaning of the phrase in question would signify. Could the witness be under a mistake as to the terms

of his agreement or have forgotten them ? His memory might have been refreshed by proper and pertinent interrogations to the circumstances which occurred at the time, and the exactions or demands actually made of him as the price of the advance or loan upon the notes.

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But the witness, if he had ever been apprised of the alleged conventional meaning of the words he used, and was fully aware of the special contract they are affirmed to have signified, could not have forgotten the circumstance, nor have been under any misapprehension of the bearing and practical operation of the agreement. With his attention specially directed to the cost of the loan he was negotiating, and his solicitude to lessen the amount he was to receive in bonds ;—the twelve per cent. discount, and a life insurance must have made too deep an impression upon his mind for so short a lapse of time to efface or obscure. It is not probable that with security of such high order as he had to offer he would accept a loan upon such grossly ruinous terms, or if driven by his necessities into the measure, the fact could not have escaped his recollection, and he could have had no sufficient inducement intentionally to suppress or conceal (especially upon his examination on oath) the circumstance of the extortionate discount exacted from him. But it does not appear that any premium for a life insurance was ever exacted of him, or that any claim was ever preferred or suggested by the lenders to any such item, as part of the price of the loan. And the entire omission of the witness to notice these extravagant terms, which the words in question are alleged to signify, and his express denial of any mention of a life insurance, at any stage of the treaty for the loan, and the absence of all proof of any exaction, demand, or claim by the lenders from him of those oppressive rates of discount, compel me to conclude, that he did not understandingly contract in reference to any course of dealing which would subject him to such onerous conditions. If so, the usual course of dealing established by the company in regard to their discounts and loans, must have been dispensed with on that occasion by Spencer, their agent ; and the agreement between Spencer and Keeler, must have been an exception to the general practice of

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the company, and the terms of it settled by the parties themselves. And such is the character given of it by Spencer, when he comes to testify. He does not pretend that those notes were to be discounted at the rates, or upon the terms ordinarily exacted by the company; or that bonds were to be taken by the borrowers instead of money for the amount of any premium charged them for life insurance. On the contrary, he virtually excludes all such pretensions by the account he gives of the operation; for he agrees with Keeler, that the sum of \$14,000, was by the terms of the agreement between them, to be advanced in money. And the points on which they differ chiefly refer to the \$6000, residue of the notes upon which the advance was made.

Spencer too, is equally silent with Keeler as to any conventional meaning acquired by the words in question. He states the course of dealing and mode of transacting business in reference to discounts and loans at the office of the company, and admits, in substance, that loans were paid in bonds of the company, and that six per cent. of the amount of the bonds, and a premium of six per cent. for a life insurance, never intended to be effected, were required of the borrowers in cash at the time, and as the terms of the discount or loan. But he speaks of no conventional meaning of any particular phrase or words to signify or indicate those terms to borrowers. He proves that Keeler was a dealer of the company, and had previously contracted other debts to them, by the discount of bills and notes at the rates required by them in their ordinary course of dealing. But the whole tenor of his testimony goes to shew that the arrangement between him and Keeler, relative to those notes was not brought within the pale of the general practice of the company, and had no reference to the course of dealing, for the terms or conditions of the advance or loan upon them; but that it was an independent agreement for the discount and loan in question, upon terms negotiated and agreed upon between themselves.

Why, then, does not the testimony of Spencer furnish all the information and discovery which the question excluded by the Judge could, in its widest range, have elicited from Keeler? If so, a new trial to let in the further examination of Keeler, would

be useless and vain. I have been led into more extensive views of the bearings of this excluded question, and the disclosure avowed on the argument, as the object of it, than the vindication of the decision of the Judge might seem to call for; as well from the consideration that the evidence of Spencer on the subject, appeared to me, when collated, so fully to meet the professed objects of the inquiry, as to supersede the necessity of that inquiry altogether, and thus obviate the force of the defendant's objection, as from the impression and belief also, that other matters of material bearing upon the defence of usury could be advantageously noticed and explained in that mode of treating the subject.

Spencer was obviously the most competent witness to testify to the practice and course of dealing of his own company, and the peculiar signification any words might have acquired by that practice and course of dealing; and the deep-rooted aversion, which the defendant in the sequel of the trial discovered, to the introduction of Spencer as a witness, is the only assignable reason why he should resort to the secondary, and at least questionable species of evidence, he offered to prove those matters: when Spencer himself, who was the president of the company, and the immediate party to this arrangement with Keeler, and who was present in court, must have been familiar with the facts, if they existed, and must have known, moreover, how far Keeler contracted with notice of those facts, and in reference to any settled rates and terms of discount by the company. He must have had cogent reasons for his course, and must either have distrusted Spencer's integrity, or the sufficiency of his own evidence—if drawn from the best and highest sources—of the facts he wished to prove, or he could not have preferred to abide by Keeler's evidence, as the case represents it, rather than call a witness who was fully possessed of personal knowledge of the whole matter. The testimony of Keeler certainly was not satisfactory, and it would, I think, have been difficult to prevail upon judicious and impartial men to make it the basis of a verdict against the purity of the notes, and in avoidance of the plaintiffs' demand. But my views of this testimony would seem not to agree with the opinion respecting it of either of the parties to the suit. They both attached

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to it the weight and importance of decisive proof. The defendant was so impressed with its conclusive force as *prima facie* evidence at least of the fact of usury, that he rested his defence upon it alone; and the plaintiffs viewed it with such apprehensions of danger, that after vigorous but unsuccessful struggles to exclude the witness, they called Spencer to discredit him and disprove his statements. Spencer's account of the arrangement with Keeler, as we have already seen, varies materially from the statements of Keeler; and on some points they are in direct collision. Spencer, for example, is positive that nothing was said about bonds or interest, and that no part of the loan was to be made in bonds:—a statement utterly at variance and wholly irreconcilable with the testimony of Keeler, who makes it the prominent feature of the arrangement, that \$6000 of that loan was, in effect, forced upon him reluctantly in bonds at par, which, at the time, were  $4\frac{1}{2}$  per cent. below par in the market. But Spencer represents that it was a part of the agreement, that if the advance of \$14,000 was not repaid, and the house of Keeler & Rogers did not go on with their business, then the notes were to remain as security for any further claim, which the company had or might have upon that firm. But all the pre-existing claims of the company were upon usurious discounts; and it was upon this appropriation of the notes in question, to secure those tainted demands, that they received their contamination. If, then, Spencer is to be believed, his testimony establishes the defence Keeler was called to prove. Spencer was introduced by the plaintiffs to correct the errors of Keeler, and to give the genuine and accurate version of the agreement which Keeler was charged with having mis-stated. He was assailed by the defendant as an adverse witness to him, and a witness, whose credibility it was his interest to impeach and destroy; upon those principles the parties acted, and much of the time of the court appears to have been consumed in attacks upon, and defences of, the credit and character of that witness, the defendant producing all the proofs in his power to discredit him, and the plaintiffs putting forth their whole strength to sustain him.

It turns out, that his disclosures on the stand have made him in effect the witness of the defendant, and arrayed him in hostility



with the plaintiffs' demands. He has unfolded a system of operations by the Hudson Insurance Company in the discount of bills, and the loaning of money upon negotiable paper, which was confessedly illicit and indefensible. And his testimony shows, that the notes in question were, by the terms of the arrangement concerning them, devoted not only to the reimbursement of the advance upon them, but to the protection also of debts usuriously contracted under that system of operations; and they received from this preconcerted, and in part, as I conceive, illicit appropriation of them, a taint of the usury with which those debts were imbued. It can no longer be the interest of the defendant, therefore, to urge his objections to the credit of the witness; and the plaintiffs cannot repudiate him, nor disclaim the history of the transactions, which he has given them. It was competent to them to have shown, that he was under a mistake, or had been incorrect in his statements: but they offered no evidence to explain or correct his testimony. They, on the contrary, insisted upon its verity, and called a witness to corroborate him, who confirmed his statements, as to the terms of the loan, and the agreement with Keeler, which composed the material points of his evidence, on the question of usury.

There is certainly a discrepancy between the statements of Keeler and of Spencer relative to the residue of the notes beyond the advance upon them. But the plaintiffs would resort, with ill grace, to a witness, they denounced as incompetent to testify, (and against whose whole examination they object) for proof to outweigh the evidence of their own witness. And if, as they insist, his testimony is to be objected to, or laid out of view, and the verdict left to stand upon that of Spencer, the embarrassment, if any, which would result from the discrepancies between them, would necessarily disappear. But if both are held to be competent and credible witnesses, the evidence of Cunningham, must give the preponderance to Spencer. Cunningham is wholly unimpeached. The agreement between Keeler and Spencer was made in his presence, and he is full, clear, and positive in his statements as to the terms of the loan, and the agreement between the contracting parties. And on these important

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points, he in all respects corroborates Spencer. But I pass by exceptions taken to the credit of Spencer, and the evidence in support of them, without further comment ; as well for the reasons already assigned, as upon the ground also, that the decision of the Judge upon the question of usury, to which the material evidence of the witness applied, entirely superseded all necessity or use of any discussion of the weight of evidence or credibility of witnesses.

The jury, I am bound to presume, were guided by his opinion and direction, and came to the conclusion they did, against the defence of usury, without examining or deciding upon the credit of the witness. The Judge decided, and he instructed the jury, that if in point of fact the note in controversy was taken in part to secure usurious paper, still that circumstance did not make it void. This, it is true, was explained by the Judge, at the time, to be a mere formal decision made by him for the purpose of bringing up the question for the consideration of the court, and not intended to express any deliberate opinion of his own upon the point ; yet the influence of it upon the jury was the same as the settled opinion of his honor would have been. They were told, that in judgment of law, a note taken to secure usurious paper, was not for that reason void. The jury under such a decision, if they acted discreetly, would, as a matter of course, find against the usury, and the validity of their verdict must depend upon the correctness of the rule of law given them by the Judge for their guidance. And as that rule of law was, in my judgment, erroneous, I should be unable, whatever might be my views of the evidence in support of the facts, to sustain the verdict. Upon the same grounds we might decline to express an opinion upon the proposed inquiry into the usual terms of loaning in the Hudson Insurance office in reference to the compensation taken for loans. That inquiry was defended as allowable and proper for testing the accuracy of Spencer's memory as to the terms of the loan in question. But if the Judge was correct in the position he assumed, that the facts were undisputed, and the point in controversy reduced to a question of law, any inquiry instituted to test the accuracy of Spencer's memory, must be regarded as immaterial, because inapplicable to this

branch of the defence, and immaterial as respects the usury, on which the defendant relies.

But there are other reasons against its admission for any purpose. And first, it is irrelevant; for the true point of inquiry, as respects those parties, was the terms of this particular loan, which might be in conformity to the general practice of the lenders, or might deviate from their usual terms, and be arranged by special agreement between the immediate parties to this particular contract. And secondly, the witness did, in the course of his cross-examination, in fact answer the question, by disclosing the course of dealing and practice of that company in their loans of money, and the usual rates of compensation and terms of the loans taken of them; and he superadded, that the practice and course of dealing to which he thus testified, was the usual mode of transacting the business, and was rarely departed from: a disclosure, which must, I think, be acknowledged to have fully satisfied the inquiry in its broadest requisitions.

I express no opinion upon the form or substance of the interrogatories proper to be put to a witness, who is examined to the character of another witness, or upon the right of the impeaching witness to take his own knowledge into the account, in forming his opinion as to the credit of the witness he comes to impeach. And upon the much litigated question of the competency of an objecting party to examine to general character—without limiting his questions to the points of truth and veracity—and upon the correlative question also, whether—if testimony to general character without such restriction be admissible, and the opinion of the witness is unfavorable, and he assigns a cause for believing the character of the witness he impeaches to be bad—an inquiry is proper, into the origin and source of that opinion, and as to the solidity of the grounds, upon which he professes to found it, in order to enable the jury to estimate them correctly: I also refrain from expressing my opinion, because those questions, whatever might be the decision of them, could not (as regards this particular branch of the defence of usury, in the turn given to that defence by the Judge) be relevant, or have any material bearing upon the present application. The opinions

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expressed by the Judge upon the evidence, and his directions to the jury, had the effect virtually to withdraw from them all consideration of the facts—upon which the charge of usury now under consideration was founded—as not being in dispute; and to place that branch of the defence exclusively upon a point of law, which he, at the same time, decided against the defendant. It would be a waste of time to discuss questions of evidence in the face of that decision; for the principle of it is, that the facts in evidence, (admitting them to be true,) and presuming the note in controversy to have been taken in part, as a security for the payment of usurious debts of Keeler & Rogers to the company, do not impress the stain of usury upon the note itself, or avoid it as a valid security. Consequently that decision, if sustained, puts an end to that branch of the defence; and if erroneous, the error must first be corrected, and a new trial awarded, before these questions of evidence reserved for the opinion of the court, if material to the defendant, and determined in his favor, can be available to him.

But independently of the charge of the Judge, and upon the supposition that his decision is less absorbing of other points than I conceive it to be, still, none of the questions of evidence I have passed over, appear to me to affect the defence of usury, upon which I place my decision, in the views I take of the merits of that defence; for Spencer was admitted to testify, and proved the note in controversy to be infected by the taint of usury. The plaintiffs, by whom he was introduced, accredited, and defended, must admit him to be a credible witness. And if it should be conceded, that the defendant had the right to pursue the course of examination to credit, which was denied him, the redress for the injury, if any was sustained by him, would be a new trial; and to that redress the testimony of the witness, if admitted to be correct, and taken as true, will, as I understand the rules of law applicable to the case, entitle him. We must decide the principal question, upon the rule of law laid down by the Judge, which is directly in issue between the parties, and vitally affects the validity of the verdict: and as my opinion is clearly against the plaintiffs on that ground, an opinion upon those collateral points cannot be necessary.

But another objection is taken to the verdict, which is equally fatal with that of usury. It is this, that the plaintiffs discounted the note for \$14,000 only, and the recovery is of the whole amount of it with interest. This finding of the jury was also in conformity to the opinion and charge of the Judge, who decided that the plaintiffs, if entitled to recover at all, were entitled to recover the whole amount of the note, as the court could not look into or regard the rights of the *cestui que trusts*. To this part of the charge the defendant objects, because the plaintiffs were not restricted in their recovery, as he contends they ought to have been, to the \$14,000 of the note discounted by them, with interest from the time it fell due; and the question is, whether they showed any right to recover beyond the amount of such discount. The plaintiffs justify their recovery of the full amount, upon the ground that the title was vested in them, as the holders and possessors of the note, which was an entire security for themselves, and those to whom the surplus interest in it belonged, and that they were entitled to recover that surplus interest as trustees for whomsoever might be the beneficial owners of it. But the defendant insists, that the party who limits his discount to a part only of a note, takes it in effect as a note for the amount, for which he discounts it, and that the ownership of the residue, which he declines to take, is left in the original holder, who offered it for discount, and remains subject to his disposition and control. And it is suggested, that when the reduction of the note itself is practicable, the course is actually to reduce it to the sum agreed to be discounted, by the substitution of a new note for that amount in its place; and where such reduction is not practicable—as in the case of business paper for example—a memorandum is accustomed to be made of the sum agreed to be discounted: but that, whether those precautions are taken or not, the fact of the discount of part only of the note, necessarily restricts the title and ownership of him, who makes the discount or purchase, to the part he discounts;—the residue or rejected portion of it continuing absolutely vested in him, who offered it for discount.—And that an agreement is implied between the new party in interest and the original proprietor, whereby they become part owners in proportion to their

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respective rights of aliquot parts of the note thus partially discounted: but that no part of the residue results to the discounters from his discount of the part he consents to take, and the possession he necessarily acquires and retains of the note.—And that he would not be entitled to recover upon it, beyond the portion of it, which was discounted or purchased by him, and could not intermeddle with the residue, which he had refused to take, and had rejected.

What the precise effect of such a partial discount of a note may be, and what the legal and equitable rights and interests of the respective parties, who offer it for discount, and who discount it, in part, would be, in the several portions of it, and in the entire note;—and especially whether—in the event of the insolvency of all the parties to it, and the previous transfer in good faith of the undiscounted portion of the note to a purchaser for a full consideration, or the intervention of general assignees claiming title to that part of it, which the discounters declined to take—the party, who discounted it in part, and is the holder of it, would be entitled to the security of the whole note for the repayment of the amount of his discount, and have a right to the dividends, on that principle, of the estates of the insolvent drawers and endorsers, until fully repaid his advances, with interest and costs of suit;—or whether he must be content with dividends upon the amount only, which he discounted, and leave the dividends upon the portion he refused to take on discounts for the use and benefit of the particular purchaser, or the general assignees, as the legal or beneficial owners *pro tanto* of the note—are questions, perhaps, of some delicacy, but which it is not necessary for the purposes of this application to consider or decide.

Whatever the rights and interests of the discounters may be, in cases of the insolvency of the parties to the note, and the consequent dishonor of the paper, and pursuit of his remedy by action, his demand, under any circumstances, against the makers, if discounted for them, could not exceed the amount of his advance, with interest and costs of suit; and upon the payment of that amount, he would be compellable, unless clothed with rights or equities to the surplus in it, on other grounds,

to deliver up the note. In the present case, the note had been negotiated and passed to the Hudson Insurance Company, and was afterwards deposited by Spencer, the President of the Company, with the plaintiffs—by what authority, does not appear—as collateral security for a loan of \$10,500, made to him on his own note at 60 days; and we learn from Leavitt, the former President of the bank, that it was discounted by the bank upon his own application without the knowledge of Spencer: that Spencer was largely indebted to the bank at the time, and had agreed that any paper belonging to him, found there, should be held by the bank as security for his debts; and that the note in question was, in June, 1826, found in the Bank, and he, Leavitt, having been informed by Spencer, that \$14,000 had been advanced upon it, caused it to be discounted for that sum, and the amount carried to the credit of Spencer.

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Hence it appears, that the plaintiffs knew at the time they appropriated the note to their own use, that the sum of \$14,000, and no more had been advanced upon it by Spencer, who deposited it with them; and it was afterwards taken by them under the form of a discount, at the instance of the president, for that amount only, and Spencer credited with that sum as the avails realised for the discount of it by them. If, then, it be conceded, that lenders, who discount a note for part only of its amount, become trustees for those, who are interested with them in it, as to the surplus and residue of the note beyond the discount or loan upon it, that trust would enable the discounter, as holder, to recover of the maker—for the sole use of the endorsees or *cestui que trusts*, for whom it was discounted, to the extent only that the maker would be liable to those indorsees themselves—in an action by them directly against him upon the note; and he would be entitled to all the defence against the trustee, as to the residue of the note beyond the discount, that he would have in an action against him by the *cestui que trusts*. Now it is in proof, and it is not denied, that the whole advance of the Hudson Insurance Company to Keeler upon the two notes they received of him, was \$14,000, and no more. How could that company claim to recover of the defendant a larger sum? It is true, that the loan contracted for, as

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stated by Keeler, was \$20,000, and that the two notes amounting together to that sum, were negotiated and delivered to Spencer for the lenders, in the fulfilment of the terms of that contract; but upon the implied condition, surely, that the contract should be performed and the loan completed by them. Then, was the residue and balance of \$6,000 of the loan, or any portion of it, or the notes given for it, recoverable by those lenders against this defendant? The whole current of admissions and proofs on both sides, exhibits clear and decisive defences in every aspect of this branch of the case against such recovery. It is conceded that no part of this residue has ever been advanced or paid. Has any title been acquired to it, against the owners or indorsers of the note, which the plaintiffs can make available to themselves in this suit?

The answer is found in the testimony of Keeler and Spencer. Keeler testifies, that it was to be paid in bonds of the company at par; Spencer denies that any part of the loan was to be paid in bonds, but his explanation is, that the notes in the events that occurred, were to be held for the advance of \$14,000, and the security and payment of other debts of Keeler & Rogers to the company: and the proof was clear, that all the other debts of that firm were for usurious loans made to them by the Hudson Insurance Company, by the discount of notes and bills for their accommodation. Whether Keeler or Spencer is correct in the views thus given of the arrangement between them, the lenders, even if they could reclaim their advance, could have no legal or equitable right to any portion of this residue and surplus of \$6,000 beyond the advance; for if Keeler is right, the consideration for the \$6,000, of the loan, admitting it to be free from the taint of usury, has wholly failed by the neglect and virtual refusal of Spencer to deliver the bonds. And this being an arrangement between the immediate parties to the loan personally or by agent, and the notes being made for the accommodation of Keeler & Rogers, as the endorsers, and never negotiated or endorsed, and fully consummated by delivery—so as to make them available to the holders against the maker as operative securities, until the transfer of them to the company by Keeler under that arrangement—there was no obstacle



to an inquiry into the consideration of that negotiation of them as between the immediate parties to the arrangement. And the disclosure of that consideration, and proof of the total failure of it, showed the claim of the company or of Spencer to any part of those notes, or any interest in them beyond the advance of \$14,000, to be unconscionable and unjust. And if Spencer's account of the agreement be true, an equally conclusive defence is shown; for the residue of the notes beyond the advance, being, according to his statement, (by the express terms of the agreement under which they were taken) to be held and applied, in the events that occurred, for the security and payment of pre-existing usurious debts of Keeler & Rogers to the company, the notes were, as I apprehend, contaminated throughout by the taint of usury, which infected the debts they were to secure. Or, if the rules of law could safely indulge the actual advance upon the securities with an exemption from the operation of the principle,—no excuse could be offered for the residue or surplus amount of \$6,000—devoted as it was exclusively to the furtherance of the fulfilment of the corrupt agreement—under which the previous debts were contracted, and to the security and payment of those usurious debts.

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The Hudson Insurance Company, if any recovery at all could have been had by them, clearly could not have recovered in any action against this defendant, if properly defended, beyond the actual advance to Keeler, with interest. And neither that company nor Spencer, who was privy to the whole history of the notes, could transfer to the plaintiffs, or vest in them any greater right or interest in the surplus beyond their advance, as trustees for their own benefit, than they themselves possessed at the time of the transfer; and it follows, as a necessary consequence, that the plaintiffs could not recover for the Insurance Company or for Spencer as *cestui que trusts*, what those *cestui que trusts* would not themselves be entitled to demand. The Judge erred, therefore, in charging the jury that the plaintiffs, if entitled to recover at all, were entitled to recover the whole amount of the note in controversy. I am satisfied that the objections against the verdict—as improperly overruling the defence of usury, and for

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that it exceeds in amount the interest of the plaintiffs in the note, and for the misdirection of the Judge to the jury, upon the questions of law, which those objections involved—are decisive in favor of the application for a new trial. But the defence of usury went to the avoidance of the entire note, and, if proved, entitled the defendant to a general verdict. In my judgment the proof of the usury was sufficient. It comes, I admit, from Spencer, and it may be objected, that his credibility was at least shaken at the trial. But is the plaintiff, who introduced him and so strenuously affirmed his claim to confidence, at liberty now to take the exception? or, if a party has the right to avail himself of the shade of discredit thrown upon his witness by his adversary, are not the statements of this witness corroborated by Cunningham? and do they not derive additional support also from the conceded facts of the case? On these points I have already given my impressions;—they incline me against the validity of the objection as taken by the plaintiffs, in opposition to the present application. Besides, the question of the title of the witness to credit, if open, belonged to the jury; and the Judge in his charge to them, told them that the defendant had failed in impeaching this witness, and it was his duty so to instruct them. In the same charge he distinctly presented to them two questions of fact for their decision; one of which referred to another branch of the defence, and the other, although it had reference to the defence of usury, was confined to the conflicting evidence of Keeler and Spencer as to the fact of an agreement, that part of the loan upon the notes should be paid in bonds of the lenders; and did not touch the question as to the pollution of the paper by the usurious debt it was in part to recover, and which (as we have seen) was treated by the Judge as a point of law arising upon undisputed facts. The only question put to the jury on this head was, whether it was a part of the arrangement between Keeler and Spencer on the 22d of October, when the note in controversy was negotiated to the Hudson Insurance Company, that a part of the amount should be paid in bonds at par, with a view to cover an usurious agreement or not. And the Judge told them that if they believed Keeler, then they ought to find a verdict for the defendant; and if Spencer, then, for the plaintiffs.

The jury found a verdict for the plaintiffs, and have thereby given their sanction to Spencer as a credible witness, and acted upon his evidence as of sufficient weight to countervail the testimony of Keeler. Now if his evidence was so decisive upon the alleged arrangement for taking part of the loan in bonds, with a view to cover an usurious agreement, are we not fairly to presume, that it would have been equally conclusive of the fact of an agreement for the application (in given events) of the \$6000, the residue of the notes, as a further provision and security for the payment of antecedent usurious loans? And if so, the jury to whom the general question of the fact of usury belongs, if the decision of the Judge upon the law had been different, would, upon that evidence, probably have given their verdict for the defendant. But it may be proper in this view of the subject, to collect and present in a more distinct and condensed form the material facts proved by Spencer, bearing directly upon the point. In order to judge of the sufficiency of the proofs applied to the rules of law, are we so to expound them, as to induce another jury to find a verdict in favour of the defence of usury? And I confess, that if his evidence is entitled to credence, (and I properly appreciate its bearings and force,) the matters it discloses—taken in connection with the conceded facts of the case,—so fully and so clearly establish that ground of defence, that no impartial and intelligent jury could—under proper instruction from the court upon the law—find a verdict against it.

It is conceded, that the note in controversy was, with a note for \$5,000, substituted by mutual consent for the two other notes, in the first instance deposited by Keeler with Spencer; and that the substituted notes grew out of an arrangement for the relief of Keeler & Rogers, and Keeler & Mather, from commercial embarrassment, by the interposition of the credit of the defendant and others, in procuring funds to enable them to meet their engagements: that the substance of the arrangement was, that the defendant and those who associated with him, for the aid of these establishments, should make a joint and several negotiable note for \$50,000, in favour of K. & R., payable at 12 months, which K. & R. were to negotiate, by procuring it to be discounted for


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their own accommodation ; and that the two co-partnerships, to secure the makers against their liability to pay the note, were to execute to trustees assignments of property to an adequate amount. It is also a conceded fact, that under this arrangement, Keeler, who was a director of the Fulton Bank, on the 22d October, 1825, applied to that bank for the discount of the note for \$50,000, so agreed to be furnished him, and at the same time laid before the Board of directors two other notes—one for \$15,000, and the other for \$10,000—as collateral security for an immediate but temporary advance, until the note for \$50,000 should be obtained, and which advance he represented to be indispensable to him, to save his house from stopping their payments ; that the board declined acting upon the application at that meeting ; and that Spencer, who was President, immediately interposes with an offer of aid to the applicant.

Thus far the witnesses substantially agree, and at this point the discrepancies between them may be said to begin. I proceed to notice the prominent features of Spencer's testimony as to the subsequent events in the history of the note. He testified, in substance, that on the 22d October, on which day he first took his seat as a director in the Fulton Bank, he found Keeler at the bank applying for the loan of \$50,000 by the discount of the note for that amount, which he expected to obtain : that the Hudson Insurance Company (of which Spencer was then the President) had an interest in sustaining the credit of Keeler & Rogers, and therefore he, Spencer, judging that the bank was not likely to act on Keeler's application, offered to advance to the house of K. & R. the sum of \$14,000, until they could raise the \$50,000 by the discount of the note spoken of by Keeler ; that the terms of the arrangement between him and Keeler were, that he, Spencer, should advance to Keeler & Rogers \$14,000 on the said two notes—one for \$15,000 and the other for \$10,000, then held by them—and which Keeler had just before offered for a similar purpose to the bank as aforesaid, until the negotiation for the loan of \$50,000 was completed ; and when that money was raised, the advance of \$14,000 was to be repaid, and Spencer was to surrender up the two notes. But if the loan of \$50,000


was not effected, and Keeler & Rogers stopped payment, then Spencer was to hold the two notes as security not only for the \$14,000 advanced, but for any other sums, which Keeler & Rogers then owed, or might thereafter owe, the Hudson Company. The offer was accepted, and the notes thereupon endorsed by Keeler, and delivered to Spencer, who gave him the company's check for \$14,000. It was subsequently ascertained, that the bank would not make the loan of \$50,000, and on the 27th October, Benedict, the defendant, (Keeler being also present at the time,) applied to Spencer to exchange the two notes then held by him as aforesaid, for the note in controversy, and the note for \$5,000 described by Keeler on his examination: that the exchange was made; that on the 28th October, Keeler applied to him (Spencer) for a loan of \$3000, and Spencer advanced that sum to him on the check of Keeler & Rogers, payable on the 29th; but that Keeler & Rogers stopped payment on the 28th; and this sum was not repaid. That it was no part of the original agreement that there should be a substitution of notes, and when the exchange was made, nothing was said about the continuance of the loan. And upon his further examination, he distinctly stated, that the agreement in relation to the loan made on the 22d October was, that in case Keeler & Rogers went on with their business, then they were to repay the loan of \$14,000, and take back the notes deposited, as soon as the loan of \$50,000 was effected. And that it was also a part of the agreement, that if the advance of \$14,000 was not repaid, and Keeler & Rogers did not go on with their business, then the notes were to remain as security for any further claim, which the company might have upon that firm; but that nothing was said about bonds or interest, and no part of the loan was to be made in bonds. He further states, that one branch of the business, pursued by the Hudson Company, was the making of loans in their own bonds, and the business was transacted as follows: When a loan was applied for, the company took a note for the amount, and issued a bond to the applicant, payable three months after the note would become due, and bearing an interest of six per cent., payable quarterly; the borrower, at the time of his application for the loan,

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also applied for insurance to the amount of the note on a life, until the note fell due; and that the company charged a discount on the note of six per cent., and a premium of six per cent. on the insurance, which was paid by the borrower in cash, when the loan was made. But the witness admitted that he did not know that the company had ever *issued a policy* on a life insurance, except that he thought they did issue one to a person in Delaware county: he further stated, that Keeler & Rogers, on the 22d October, 1825, at the time of the agreement between Keeler and Spencer for the loan made them on that day, owed the Hudson Insurance Company about \$22,000 on notes and bills discounted for them by the company, of which \$18,000 still remained due and unpaid at the time of the examination of the witness. That these notes and bills were all made for the accommodation of K. & R., and were all discounted for them by the company, in their usual way of doing business. That when they were discounted, the company's bonds at par were given in exchange for them, and those bonds were at that time under par, but that the discount of six per cent., and the insurance of six per cent. for the life insurance, was paid by the borrowers in cash.

From these statements it is clear, the two substituted notes were taken by Spencer for the Hudson Insurance Company, as security for the advance of a loan of \$14,000, previously made on the credit and security of the two first notes for \$25,000, by that company to K. & R., and for the further security of the other subsisting debts of the borrowers to the company. Whether the substitution of them for the first notes, was in pursuance of a provision for that purpose in the original agreement, upon which the \$14,000 was advanced, as Keeler stated the fact to be, or by the mutual consent and agreement of the parties, at the time of the exchange of the notes, as Spencer represents it, does not appear to me to be material. They both agree in the important fact, that the note in controversy, and the note for \$5000, which accompanied it, were exchanged and substituted for, and accepted and taken in lieu of the two first notes. It is not alleged or pretended, that any new arrangement was made, or that the prior agreement underwent any change or modification for

settling or regulating the terms upon which the exchange of notes took place, or the substituted notes were taken and to be held. Nor was it necessary. It was simply an exchange of security. The two substituted notes took the place in all respects of the two first notes, and were to be held upon the terms and subject to the agreement under which the first notes were deposited, and they are open to all the exceptions, and the same defence against them, which could have been taken to the notes they replaced. The fact admits of no other inference or conclusion, and it is decisive of the understanding and intention of the parties on the subject, that they have uniformly acknowledged, and treated those notes as substitutes for those on which the advance was made, and have asserted the same right and interest in them as they would have been entitled to claim in the first notes. Now, the advance of \$14,000, made by Spencer for the Hudson Company, was upon the security of the two first notes, which amounted together to \$25,000, and the agreement was, that those notes should stand and be held as security, not only for that specific advance upon them, but as a provision and security also, for the payment of the pre-existing debts of K. & R. to the company, which were contracted by the discount of accommodation notes for them; and those debts or loans upon that discounted paper were undeniably usurious, for the borrowers were constrained to allow an interest of six per cent. upon the sums borrowed, and to pay a premium of six per cent. for an insurance upon a life, to the amount of the loan, for the time the note had to run.

The bare statement of the terms thus exacted for the loan, unexplained as they are, is sufficient to show the negotiations to have been stamped with rank usury. I lay no stress upon the fact so strongly pressed at the trial, that the loans were made in the bonds of the company, which were under par in the market at the time, because, for the reasons already assigned, I am unable to discover in that operation any corrupt agreement, or any premeditated cover of an usurious loan. I base my judgment of the character of the loans upon the evidence which shows that six per cent. was taken for the loan, and an additional six per cent. exacted under the form and pretext of a premium of insurance. I

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cannot view this pretended insurance in any other light than that of a cover for the usurious premium. No policy appears to have been issued to the borrower, nor any contract given him to manifest and sustain his claims in case the life should fall in. We find that in the solitary instance in which a real insurance was effected on a life, by the company, a policy was issued and delivered to the assured; and the fact, that in the case of a life insurance unconnected with a loan or discount, a policy was issued to the assured which was understood by the company as obligatory upon them, appears to me to show, that in other cases where a discount or loan, and not a life insurance, was the primary object of the parties, the life insurance for which the borrower was required to make a formal application, and to pay the premium of six per cent., but for which no policy was issued, was not regarded by the parties to the arrangement, as an effective and binding contract; but was merely colourable and intended and designed as a device and contrivance for cloaking the illicit interest exacted for the loan.

If, then, the character of the dealing was a loan at twelve per cent., or a higher rate of interest in proportion to the shorter time of the note, as I distinctly understand it to be, it was clearly usurious; and the note in controversy for \$15,000 and that for \$5,000 which were substituted for the first two notes for \$25,000, on which the advance was made, being taken and held, as respected the residue and surplus of the contract, beyond the advance and interest, as a further provision and security for those antecedent and still subsisting usurious loans, were illegal and void. And the note in suit is equally irrecoverable in the hands of the plaintiffs, however innocently they may have taken it, as it would have been in the hands of the original parties to the corrupt agreement. It is well settled, that if any part of the loan or debt for which the note or security was given is usurious, the security is void; and I understand the courts now to hold, (in consonance, as I conceive, to principle and sound policy,) that it is not necessary that the usurious agreement and the security for the accomplishment of its illicit purpose be simultaneous; but that if an usurious loan or debt is previously contracted, and at



any subsequent time any security is given to the original parties to the contract, or any exchange of securities takes place with them, for the furtherance of the corrupt agreement, as an additional provision and security of the usurious loan or debt; such security becomes equally infected with the taint of the usurious debt, as it would have been if taken at the moment the debt itself was contracted. In the case of *Cuthbert v. Haley*, [8 Term Rep. 390.] it is admitted and ruled by the Judges, that if one security is stipulated for another, and the first is contaminated by usury, the second, which is substituted in lieu of it, if given to the party to the original contract, is void. And in the case of *Tut-hill v. Davis*, [20 John. 285.] it is held, that a mere change of securities for the same usurious loan, with the usurer himself, can never legalize or purify the original consideration, or give a right of action; but that a new note, given in renewal or exchange for former notes infected with usury, then in the hands of the original party to the usurious contract, without any new consideration, is equally infected with the first notes. The case before me comes fully within the principle of these authorities; for in this case, the previous notes for which the two notes were taken in exchange, were clearly tainted with the usury which infected the debts they were in part given to secure; and those tainted securities were in the hands of the usurers at the time of the exchange. But the case of *Harrison v. Francis Hannel*, [5 Taunton, 780.] is still more apposite. In that case, several usurious transactions had taken place between the defendant's son and the plaintiff, in which the former was indebted to the plaintiff in a considerable amount. On the last transaction the son applying for another advance, the plaintiff agreed to make him a further advance of £180, on legal interest, but as the condition of doing so, the son was to obtain from his father three acceptances, two for £100 each, and the third for £50, payable at different periods, to be securities for the whole of his debts,—parts of which debts, to the amount of £100, were for legal, and the residue for illegal consideration. The whole of the father's acceptances, however, if applied to the sound parts of the debts, would not be enough to discharge the same, together with the further advance

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of £150. The bills of the son, accepted by the father, were given to the plaintiff under this agreement, and the bill for £50, had been paid. The action was brought on one of the bills for £100, and it was held that the plaintiff could not recover, and the decision was put, not upon the ground that the father's acceptances were of themselves upon illegal consideration, for they clearly were not,—but because they were deposited to ensure another contract which was usurious. It was the agreement to obtain them, and the actual transfer and deposit of them under that agreement, as a provision and security for a pre-existing debt, mixed up and composed of sound and unsound items, that gave them the taint which polluted them. And it was because the part of those debts which were usurious, was, by the agreement, entitled to partake, and might partake, of the benefit of that security, that the acceptances were all held to be tainted and void, notwithstanding that they were not given or contracted for at the time of the corrupt agreement, but long subsequently, and for a new consideration to the extent of the advance of £150, and no usury was exacted upon them, notwithstanding that they were separate and distinct bills, capable, each of a distinct application, and the entire amount of them was insufficient to repay and satisfy the advance upon them at legal interest, and the sound part of the subsisting debts.

The Court said, in answer to the arguments drawn from these sources, that the bills were agreed to be deposited for the security of the whole debt, and were consequently given for the one part as well as the other; that the court or the defendant had no power to direct or controul the proceeds, or to cause the same to be applied to the legal debts, but that the plaintiff might apply the money, if allowed to recover it, to the satisfaction of the usurious debts, and then sue the son for those which were legal; and *Chambre, J.* said, that contract was entire, and the security given as well for the illegal as the legal part of the debt. A single glance at the two cases will show the striking analogy between them, and how closely they resemble each other in their leading features. If that case be sound, the rule it so fully discloses must govern this.

In that case, the father's acceptances were long subsequent to the son's usurious contracts with the plaintiff, and the consideration for them was, in part, a further advance of £150 at legal interest, the residue only being made applicable to the payment of the antecedent debts, two of which were upon legal considerations, and which legal debts, with the advance, were more than sufficient to exhaust the whole security. Yet, because the residue of those pre-existing debts of the son were upon usurious considerations, the whole of the acceptances were adjudged to be void; and in this case, the first notes, from those substituted for them, received their taint, though given long after the usurious debts of K. & R. to the Hudson Company were contracted; and not taken under, or simultaneously with, the corrupt; and, though the consideration of the long advance upon them was free from the taint of usury, yet because they were given as an entire provision, and provision not only for the legal loan, but for the subsisting debts anteriorly contracted upon corrupt considerations also, they must, upon the principle of the case cited, be held irreconcilable in a court of law.

The cases differ in this particular, that in the case cited, the sound debts of the son to the lender, and the further advance by him, were sufficient to absorb the whole amount of the acceptances. But in this case, the advance is insufficient to exhaust the note in suit, and a surplus of \$1,000 of that note, and the whole of the note for \$5,000, would be applicable, and to be carried to the credit of the usurious paper. That decision has therefore gone further for the suppression of usury than we are in this case called upon to go. I am aware that Spencer, on the 28th October, lent Keeler \$3,000 on the check of K. & R. payable on the 29th October, and that K. & R. stopping payment on that day, the check was not paid. No interest appears to have been taken or charged on this loan; and it was pressed upon us at the argument, as a pure and legal *debt*, towards the payment of which, the residue and surplus of the note in suit ought to be applied. I have not particularly noticed this loan, because it has not struck me as a material ingredient in the merits of the controversy. In the first place it is not sufficiently

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shown that the company were the lenders, or could exercise the right, if permissible by law, to apply the security to its satisfaction. Keeler testifies that this loan was made to him by Spencer out of his own pocket. K., therefore, did not regard it as an advance by the company, or intend that it should partake of the benefit of the security furnished by the notes for other debts. And Spencer says, that he made the loan on the application of Keeler, and upon the check of K. & R. He does not say that the loan was made by him for the company, or was so explained or understood by Keeler. He does, indeed, make use of this expression, that when K. & R. failed, they owed the Hudson Insurance Company, \$10,000, exclusive of the advances of \$11,000, and \$3000; from which mode of expression it might be inferred, that both advances were understood and intended by him to be made by the company. But he nowhere avers, nor does it appear in evidence, that the company were the lenders. But suppose such to be the fact, still both advances would fall short of the amount of securities, and the sum of \$3000, would remain for the furtherance of the corrupt agreements. Neither that check nor the note for \$5000 are in evidence, and the case is silent as to their destiny or disposition. How could they, then, be available to the plaintiffs at the trial for any purpose? The check, if produced, might be found to be clearly out of the pale of the protection of the note. But the decisive answer to its pretension to that protection, is, that upon the plaintiffs' own showing, it must deduce its title to partake of the surplus fund, from an agreement which devoted that fund to the security and satisfaction of subsisting debts, which were grossly usurious, and which it commingles with both the former and subsequent advances, and entitles to a common interest in it, with them. The privity and knowledge of the advance of \$14,000, which this note was first to repay, or the soundness of the subsequent loan, cannot rescue them from the deleterious effect of the corrupt agreement for the application of the residue and surplus of the notes beyond the advance of \$14,000, to the security and payment of the antecedent and subsisting loans. The taint of the infected notes polluted the whole security and avoids it in toto. This rule may seem rigor-

ous, but experience has shown it to be necessary, in order to reach and counteract the devices and schemes of the usurer, whose interest would tempt him on all occasions to intermix the corrupt with innocent loans; if the sound part of the loans was in jeopardy by the operation, and a security given at the time, or subsequently taken for the whole debts, though invalid as a provision for the corrupt loans, it could still be made available to him, as being for the satisfaction also of those which were untainted with usury. The lender would always be safe in realising the value of the security. Having parted with his whole power and controul over it, and vested the same in the lender without any special agreement or direction for the application of the avails of it,—must not the lender, thus possessed of the security with these ample powers over it, have the right to apply the proceeds to the payment of the debts for which it issued in such order as he may think proper? If so, the usurious loans as being precarious demands, would have the preference and be first paid. And the only effectual remedy, for the mischief would seem to be, to adjudge the whole security void, if any one of the debts which are to partake of its benefit is tainted with usury.

On these grounds, the defence appears to me conclusive, and withal so impregnable, that the plaintiffs, on the same evidence, and with instructions from the court upon the law, corresponding with our opinions, could not hope to escape on another trial, from a verdict against them. And I deem it proper, therefore, to refrain from expressing my opinion upon the other branches of the defence; for, if it should be conceded that the negotiation of the notes to the Hudson Insurance Company, and the advance of that company upon them, did not bring them within the prohibition of the restraining act, and that the operations of the company with them were not so entirely unauthorised by their charter as to affect their validity, or the right of recovery at law upon them, in the hands of that company, and that the plaintiffs at the time the note in controversy was taken by them, had no knowledge, and were not chargeable in law for actual or constructive notice of any part of its previous history, some of which are, however, in part conceded; yet if the note was tainted with

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usury, it is void. And, admitting usury to have been a question of fact for the jury, that question, in the views I have taken of it, was not submitted on this trial to the consideration of the jury, and must be referred to another jury. The motion for a new trial is granted on the payment of costs.

OAKLEY, J. This was an action on a joint and several promissory note, dated the 22d of October, 1825, for \$15,000 payable in twelve months at the Fulton Bank, without interest, to the order of Keeler & Rogers. The note was signed by the defendant and W. S. Dezens, J. H. and E. S. Beach, Gilbert F. Lush, Chandler Starr, Elias Mather & Co., Spencer Stafford, H. & S. Stafford and Gregory & Bain. The plea was the general issue with notice of special matter. The jury found a general verdict for the plaintiffs for the full amount of the note. The defendant now moves for a new trial on several grounds. I. It is contended, that the note in question is void on the ground of usury, and that the Judge at the trial did not direct the jury correctly on that point. I shall first examine this feature of the case. [The Judge here stated the facts of the case as far as they relate to this point, and proceeded as follows:]

The law on this subject seems to be well settled. If, on the discounting of the notes and drafts held by the company on the 22d of October, the premium of six per cent. on life insurance was taken, as a cover for exacting more than legal interest on these loans, these notes and drafts were clearly usurious. It is also clear, that if the note on which the action is founded, was made solely for the accommodation of K. & R., and was negotiated by them to the Hudson Company, as security in whole or in part, for such usurious paper, it is also usurious and void. These however, are questions of fact, which ought to have been submitted to the jury, and however strong we may consider the evidence on these points, I do not see that we are at liberty, as the case comes before us, to determine them. The Judge at the trial charged the jury, that if the note in question, was negotiated to the Hudson Company to secure pre-existing usurious paper, in the hands of the company, it was not therefore, itself usurious. If the Judge

erred in this opinion, it follows of course, that there must be a new trial. Feb. Term,  
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In the case of *Tutill v. Davis*, [20 Johns. Rep. p. 283.] the Supreme Court held, that a mere change of securities for the same usurious loan to the same party who received the usury, or to a party having notice of the usury, does not purge the original illegal consideration, so as to render the new security valid. The same doctrine was held in *Jackson v. Henry*; [10 Johns. Rep. p. 195.] and the case of *Cuthbert v. Haley* [8 Term. Rep. p. 390.] is there cited and sanctioned. In *Tate v. Wellings*, [8 Term. Rep. p. 537.] the same rule was laid down by Lord KENTON, and more recently in *Preston v. Jackson*, [2 Starkie, 211.] by HOLROYD J., at nisi prius.

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The principle of all these cases is familiar, and well settled. In the present case, however, it is said that the loan of the \$14,000 on the 22d of October, being clear of any usurious taint, affords a new and valid consideration for the notes negotiated by K. & R. on that day; and although they were to remain on the happening of a certain contingency, as a security for other paper, which might be usurious, that circumstance cannot make them void. It is to be remarked, that the contingency alluded to, actually happened, and the notes were accordingly held by the Hudson Company as valid notes for the full amount under the original agreement, upon which they were negotiated, and I am of opinion, that the new consideration for the notes arising out of the loan on the 22d of October, being coupled with the agreement that they should be held as security for other usurious paper, does not take them out of the operation of the statute against usury. The contract, on which they were negotiated, was entire, and being void in part by the statute, must be considered wholly void. This principle is fully recognised and established in *Harrison v. Hannel*, [5 Taunt. p. 780.] and in a case stronger than the present, in favour of the impeached security.—In that case, the acceptances in question, applied to the sound part of the transactions, would not pay the money actually advanced, without usurious interest; whereas, in the case now before us, the new loan

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of the 22d of October, with the subsequent advance of \$3000, is less than the amount of the two notes negotiated at that time.

It was contended on the argument, that the note in question was not an accommodation note for the benefit of K. & R., and and was, therefore, a valid subsisting contract at the time it was passed to the Hudson Company. If this was so, any usury in the agreement at the time of its negotiation to the company would not affect it. This view of the subject was thought to be supported by the assignment of the property of K. & R. to the makers of the note. It was said that that assignment constituted a good consideration for the note of \$50,000 mentioned in it, as between the makers and payees; and that K. & R. could have enforced payment of it, though it had never been negotiated by them. Assuming that the note now in question, may be considered as having the same connection with the assignment as the note for \$50,000, it is quite clear, that it was not the intention of the parties that it should be paid, unless it should be negotiated by K. & R., and the money raised on it for their benefit; and the other evidence in the case is quite conclusive to show, that all the notes in question were made exclusively for the accommodation of K. & R. They were not, then, subsisting notes in judgment of law, until they were negotiated by the payees, and any usury in such negotiation is fatal to them. [*Marvin v. McCullum*, 20 Johns. Rep. p. 238. *Mann v. Commission Company*, 15 Johns. Rep. p. 44. *Powell v. Waters*, 17 Johns. Rep. p. 176.]

It is also contended, on the part of the defendant, that the note in question is void by virtue of the 2d section of the act to restrain incorporated Banking Associations. [2. R. L. p. 214.] That act provides, "that no person unauthorized by law shall become a member of any association institution or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any business, which incorporated banks may transact." The act inflicts a penalty on any person coming within its scope, and then provides, that "all notes and securities for the payment of money or the delivery of property made or given to any such association, institution, or company, not



"authorised as aforesaid, shall be null and void." The note in question having been negotiated to the Hudson Insurance Company, partly on a loan of money, and partly in security for notes and drafts previously discounted by that company, it becomes necessary to ascertain whether that company was acting within the scope of its authority, as derived from its act of incorporation. In the case of the *People v. The Utica Insurance Company*, [15 Johns. R. p. 358.] the general principle is laid down, that a corporation has no powers except such as are specially granted by the act of incorporation, or such as are necessary to carry into effect the expressly granted powers. And this principle has since been constantly recognized. This company was incorporated for the purpose of making insurance against fire, marine insurance, and all other insurances not prohibited by law. [Ses. 34. Ch. 154.]

The first section of the act of incorporation, provides, among other things, that the Company shall have the power of "contracting and being contracted with, relative to the purposes and business," for which the corporation was created, as declared in the said act. The second section prescribes the mode of securing the the capital stock, which is to be by "*lien on real estate*." By the 9th section, the company is authorised to invest the capital stock, from time to time, in any of the public stocks. The 7th section specially defines the kinds of insurance which the company is at liberty to make. The 11th section prohibits the company from making any contracts for the payment of money only, unless under the seal of the corporation.

Here, then, is a corporation with clearly defined powers—its objects specially pointed out, and its right of making contracts strictly limited to the purposes and business for which it was created. The mode of investing and securing its capital stock, is distinctly prescribed, leaving no room for implying any power of loaning money generally for the purpose of such investment. It is true that it had, by fair implication, the right to make contracts for the payment of money under seal, but such right cannot be considered as general and unlimited, without disregarding all the other provisions of the act. The general restriction of the power of contracting to the purposes of insurance, taken in connection

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with the power of making contracts under seal for the payment of money, clearly shows, that the latter power must be confined to the giving of bonds or making of contracts for the payment of such debts as the company should incur in the course of its regular business. Any other construction would conflict with the general intent of the act of incorporation, and would, in its practical effects, defeat most of the restrictions and limitations contained in it.

It is quite clear, from this view of the act, that the company had no right either to discount a note or to loan money in any manner on the security of a note. It is not given to it expressly by its charter, nor is it in any degree necessary to carry into effect any power delegated to it. The case comes entirely within the principles laid down by the Supreme Court, in the *People v. The Utica Insurance Company*, and in the cases of *The New-York Firemen Insurance Co. v. Sturges and Ely*. [2 Cow. R. 664. 678.]

It appears from the testimony of Spencer, that the company, acting under this charter of strictly limited powers, abandoned almost entirely all the objects for which it was created; that it made little or no insurance of any kind, and that its general and usual business in the employment of its capital, was *discounting notes*, and *loaning money on notes*, or other personal security.

Here, then, was an existing fund diverted from its legitimate purposes, and applied to one, at least, of the kinds of business generally transacted by incorporated banks; and in the case of *The Firemen Ins. Co. v. Ely*, SUTHERLAND, J. says that the "ordinary and habitual application of a fund to any of the purposes of banking, is conclusive evidence of its creation for such purposes."

In the *People v. Bartow*, (6 Cow. R. p. 294.) the Court say, that "the discounting of notes is the principal business of a banking institution," and it would be doing violence to common sense to consider that the loaning of money on notes, when the interest is taken at the termination instead of the commencement of the loan, is not a discounting of such notes within the fair meaning of the restraining act. Nor can it be successfully contended, that the giving of bonds in exchange for notes discounted in lieu

of other notes or contracts, for the payment of money not under seal, (as is ordinarily done by banks,) can at all vary the case. Such distinctions, if sustained, would effectually render the restraining act a dead letter.

Here, then, we have a company or association unauthorized by law to carry on any kind of banking business, possessing a fund, and habitually devoting that fund to some of the ordinary purposes of banking. It does not seem to admit of doubt, that in doing so, it was in the constant habit of violating the provisions of the restraining act; and it follows, that all notes or securities given to it are null and void by the express terms of the law.

The Judge, on this part of the case, held at the trial, that the negotiating of the note in question to the Hudson Company, unless it was usurious, did not render it invalid. In this, I apprehend, there was error, and that upon this ground, also, a new trial ought to be granted.

There are other questions involved in the case, upon which I have not thought it necessary to give any decided opinion, in the present stage of the cause. I will, however, state my present view of them.

I. The note, if not void by the restraining act, is clearly taken by the Hudson Company without authority; and it may well be contended that no action can be sustained on it by the company. If the plaintiffs had notice of the fact, that the note had been negotiated to that company when they took it, the illegality of the transaction can be set up against them. This question of notice was left to the jury, but under instructions too narrow. They were told, that notice to individual directors was not notice to the corporation, unless brought home to the *board*, or to the officers of the bank. I think that, under some circumstances, notice to a director ought to charge the corporation, as where the director acts in any particular business, as the special agent of the bank, as in the case of *Rathbone*. He was one of a committee to inquire as to this very note, and he knew, or thought he knew, that the note had been negotiated to the Hudson Company. He may have been mistaken in this, but that matter ought to have been:

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left to the jury. I think that, under the circumstances, whatever ought to have put Rathbone on inquiry relative to the note, were it an individual case, ought also to be considered sufficient to charge the corporation with the duty of making inquiry also. The true question is not, whether the bank had positive knowledge of the fact, but whether they had knowledge of circumstances which, in the exercise of ordinary prudence, ought to have put them on their guard.

II. As to the extent of the recovery by the plaintiffs. I am inclined to think, that the Hudson Company could not sue on this note: and the plaintiffs cannot, in any event, recover beyond the extent of their advance on the note. If the note itself was void in the hands of the company, it seems that the *money loaned* might have been recovered back by that company, and that for any thing advanced by them on the note, beyond the sum received from the plaintiffs, the company may still have their action against Keeler & Rogers. [10 *John. Rep.* 198. 8 *Cowen's Rep.* 20.]

III. In relation to the questions, which arose on the trial as to the impeachment of the character of witnesses. I think that a witness cannot be asked, whether from his *personal knowledge* of the impeached witness he would believe him under oath.

The English rule seems to be, to inquire of the impeaching witness his means of knowledge of the *general character* of the witness impeached, and whether, from *such knowledge*, he would believe him under oath.

This seems to me the true rule. To inquire only as to *general character for truth* seems too narrow. His general character for *truth and honesty* must be the ground of his *general credit as a witness*. If a man when asked that question says, that it is good, no further inquiry is necessary, as the law then implies, that the witness is entitled to credit. If the answer is, that it is bad, the other party may inquire into the *general grounds of such opinion*, in order to enable the jury to determine as to the *extent of such bad character*, and how far it ought reasonably to discredit the witness; and it is competent also, in such a case, to ask whether,

notwithstanding such general bad character, the impeaching witness considers him entitled to credit upon oath, because that seems to fix the extent and nature of the general bad character attributed to him.

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IV. As to the question put to M. Hoffman. It seems to me, that the Judge erred in telling the jury, that they were to lay out of view *entirely* the evidence of Spencer's bad character, if it connected itself solely with the conspiracy cases. A *bad character* may, and often does arise from a particular transaction. Suppose the case of a man tried for *perjury* and acquitted, but on grounds of a technical kind. That trial may *justly* fix his character as a witness, to be *infamous*.

The true rule is, that you may inquire into the *origin* of the opinion, that a witness's character is bad, for the purpose of enabling the jury properly to estimate it; but it is going too far to tell them, that they cannot notice such evidence at all, if it arises from a charge made against the witness, of which he was acquitted.\*

*New Trial granted.*

[Ward & Hoyt, *Att's for the plff's*. R. C. Wheeler, *Att'y for Def't.*]

\* Upon this last point, vide 4 *Wend. R.* 229. *The People v. Mather.*

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In an action upon a policy of insurance against fire, if the defendants admit that they are liable for the loss, and the controversy between the parties relates solely to items of injury, and the amount of loss sustained by the assured, the court will refer the matter to referees, to adjust the amount.

In mixed questions of law and fact, where long accounts are involved, it is the practice of the court to hear the cause until the questions of law are disposed of, and then refer the accounts to referees. If the referees named are objected to by either party, the court will draw them from the jury box.

*Mr. P. A. Cowdry*, on the part of the *defendants* in this cause, moved, that the matters in controversy between the parties be referred to referees, to adjust the amount of the plaintiff's claim. The defendants (he said) admitted the making of the policy, and their liability for the loss, and their defence related to the *amount* of the plaintiff's claim, and not to the principles upon which it was founded. The preliminary proofs showed a great number of items said to have been injured or destroyed; and *Mr. Cowdry* contended, that the accounts relating to the injury, should be referred to referees for adjustment.

*Mr. J. Anthon, contra*, for the plaintiff, resisted the motion upon the ground, that questions of law might arise, which could not be disposed of by the referees.

*Per Curiam.* The defendants admit all the principles upon which the plaintiff's claim rests, and confine their defence exclusively to the items of injury, and the amount of the loss. There cannot, therefore, be any questions of law involved in the controversy, and the duty of the referees will be confined entirely to the questions of fact presented by the account of loss. As the injury sustained by the plaintiff extends to a great variety of items, the amount and extent of his loss can be much more conveniently ascertained by referees than by a jury.

Where there are mixed questions of law and fact presented by long accounts, our practice is to hear the cause until the questions of law are disposed of, and then send the accounts to referees for adjustment. The jury, in the meantime, are directed to bring in a verdict for an amount sufficient to cover the plaintiff's claim, which is to be modified, or reduced to the amount reported by the referees. This practice saves much time, and the referees can look into the items of the accounts with a proper degree of accuracy and care. If the referees named are objected to by either party, the court will draw them from the jury box, and obtain an impartial tribunal by this means. This course will be resorted to in the present case, if the parties object to the referees now named to the court.

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The Mechanics' Fire Insurance Company

*Motion granted.*

[E. Barr, *Att'y for the plff.* P. A. Cowdry, *Att'y for the defts.*]

April Term,  
1899.

The  
Fulton Bank  
v.  
The  
Phoenix Bank,



THE PRESIDENT, DIRECTORS & CO. OF THE FULTON BANK OF  
THE CITY OF NEW-YORK,

versus

THE PRESIDENT AND DIRECTORS OF THE PHOENIX BANK.

Where a negotiable promissory note, endorsed in blank by the payee, has been fraudulently or feloniously taken from the true owner, and that fact is shown at the trial; the person into whose hands it passes, cannot recover upon it against the maker, unless he show himself to be an innocent and *bona fide* holder for a valuable consideration.

The Phoenix bank of the City of New-York issued a post-note, payable 60 days after date, to J. G. or order, on demand. This note, being endorsed by J. G., was put into the mail at Charleston in the state of South Carolina, to be transmitted to N. Y.; but the mail being robbed, it never reached the hands of the true owners, but passed into the possession of Prime, Ward, King & Co., who deposited it in the Fulton Bank and received credit for a like amount, in account with that bank. The plaintiffs presented the note to the Phoenix Bank for payment, and it was refused, upon the ground that the note had been stolen from the true owners, who had requested the defendants not to pay it. The amount of the note although passed to the credit of P., W., K. & Co., by the Fulton Bank, had never been drawn out by them, and upon action brought by the Fulton Bank, against the makers, to recover the amount of the note—it was **Held**, that the mere act of giving credit to P., W., K. & Co., for that amount, by the Fulton Bank upon their books, did not constitute them *bona fide* holders of the note for a valuable consideration.

Bank *post* notes, over due, are not to be regarded as subject to all the rules applicable to ordinary promissory notes, but they become assimilated in their character to ordinary Bank notes.

*Assumpsit*, brought by the plaintiffs to recover the amount of a *post-note* for fifty dollars, made by the defendants, and bearing date on the 23d of December, 1826, payable sixty days after date, to Jasper Grosvenor, or order, *on demand*.

The defendants *upon the record*, had themselves no objections to make against the payment of the note to the plaintiffs, and the defence was, in fact, interposed by S. & M. Allen, lottery dealers, who claimed to be the real owners of the note, and that it had been stolen from them under the following circumstances:

S. & M. Allen, for the purposes of their business, had offices established both in New-York and at Charleston, South Carolina.



The note, after it had been issued, was endorsed by Grosvenor the payee, to one Samuel St. John, and by him to S. & M. Allen at Charleston, whither it had been sent as a remittance. S. & M. Allen, on the 22d of February, 1827, deposited the note in question in a package with other notes, which they had purchased, in the mail at Charleston, directed to S. & M. Allen of New-York. The mail, which left Charleston on that day, was robbed, and never arrived at New-York; by which means the package of notes addressed to S. & M. Allen did not reach its destination.

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The declaration contained a count upon the note, in which the plaintiffs claimed as endorsees direct from Grosvenor, and the common money counts were also added.

The defendants pleaded the general issue, and with the plea gave a special notice, setting forth, with great particularity, the endorsement of the note by Grosvenor to St. John, and by him to S. & M. Allen; that the note was put into the mail at Charleston on the 22d of February, 1827, directed to them at New-York; that the mail was immediately afterwards robbed, by which means the note in question never came to the persons to whom it was addressed. The notice further stated, that S. & M. Allen were the real owners of the note, and called upon the plaintiffs to show the *time and circumstances*, under which the note came into their possession, together with the *consideration* which they had paid for it.

The cause was tried on the 5th day of January, 1829, before Mr Justice OAKLEY. At the trial, the plaintiffs presented the note, which was in the following words, viz: "Sixty days after date, the President and Directors of the Phoenix Bank of New-York promise to pay Jasper Grosvenor, or order, fifty dollars on demand. New-York 22d December, 1826."

"J. BOGGS, *President*."

"J. DELAFIELD, *Cashier*."

The note was endorsed by Grosvenor in blank, and upon it there had been written this additional endorsement, "pay S. & M. Allen, or order."

"SAML. ST. JOHN, Jun."

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These last words, however, had been erased by the attorney for the plaintiffs, after the commencement of the action.

The defendants proved satisfactorily that the note in question was put into the mail at Charleston, on the 22d of February, 1827, addressed to S. & M. Allen, at New-York; that it was at that time their property, and that it had been taken feloniously from the mail immediately thereafter.

The robbery of the mail was also shown, and notices of it had been given in Philadelphia and New-York. Several of the stolen notes belonging to S. & M. Allen had been presented at their counter in New-York, for endorsement, and they had stated to the holders that the notes had been stolen from the mail. The defendants themselves had received information of the robbery, by a printed notice, and had paid S. & M. Allen the amount of the note after it had been stolen from the mail, receiving from them at the same time a bond of indemnity.

On the part of the plaintiffs, it appeared that the note in question had been received by them on the 25th of February, 1828, from Prime, Ward, King & Co. in deposit. That it was sent to the Phoenix Bank on the 26th of that month, and returned on the same day, with a message, that it was a stolen note and could not be received. It was then sent to P., W., K. & Co.'s office, and they returned it to the plaintiffs. When the note was presented to Prime, Ward, King & Co., by the messenger of the plaintiffs, they offered to take it back if he would swear that it was received of them, by the Fulton Bank. The messenger did not make the oath, as P., W., K. & Co. did not press it upon him. If they had done so, the witness would have made the affidavit, and P., W., K. & Co. declared, that they did not know where they got the note. It appeared, however, that this declaration was received from the messenger, who returned the note. This testimony was objected to by the plaintiffs but admitted by the court.

It further appeared, that the note, when received by the Fulton Bank, had been carried to the credit of P., W., K. & Co.; that there was a large balance to their credit in that bank on the 25th and 26th of February, 1828, and for several days thereafter. The note went into their general account, and they drew

checks on those days, leaving, however, a large balance to their credit. The Fulton Bank had never taken any steps to collect the money of Prime, Ward, King & Co. Mr. Ward, one of the partners in that firm, being examined as a witness, testified, that he knew not from whence their house obtained the note, nor were there any means of ascertaining that fact. He stated, however, that on the 12th of July, 1827, P., W., K. & Co. received two post-notes of the Phoenix Bank, for \$500 each, from Horatio Gates & Co., of Montreal, which the defendants had refused to pay, upon the ground that they were stolen notes, and that they had received notice not to pay them. The witness first heard of the robbery in July, 1828. Notice of the robbery, it appeared, had not been made public through the papers, upon the suggestion of the Post Master General, who thought that it might interfere with the detection of the robbers.

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Upon this testimony, the counsel for the defendants insisted,

I. That the note, having been received by the plaintiffs after it had become due, the defendants had a right to make the same defence as if the suit had been commenced by the finder, or a robber, and claimed to have the court charge the jury, that if they were satisfied that the note in question belonged to S. & M. Allen & Co., and had been lost or stolen, they should find a verdict for the defendants.

II. That the note, by reason of the last endorsement, ought to be regarded as a note payable to order, and that the plaintiffs had acquired no right to it, as S. & M. Allen had not indorsed it, and on that ground, the jury ought to find a verdict for the defendants.

III. That the plaintiffs, under the circumstances of the case, were not, in judgment of law, holders of the note for a *valuable consideration*; as they had parted with nothing on the credit of it, before they received notice of its loss, and could either have *erased the credit* they had given P., W., K. & Co. for the note, or charg-

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ed it to them, if they had chosen so to do, and that on this ground the jury ought to find a verdict for the defendants.

Upon the two first grounds, the presiding Judge was of opinion, that the defence could not be sustained, but upon the third he thought there was some doubt. He, however, instructed the jury, that the plaintiffs were to be considered by them as *bona fide* holders of the note for a valuable consideration, and that the only question of fact for them to find, was, whether the plaintiffs had notice of the loss, or sufficient information to put them on inquiry when they received the note, and whether they had acted negligently in receiving it, under the circumstances.

To the opinions above expressed, and to the charge of the Judge, the defendants excepted. The cause was summed up upon the questions of notice and negligence by the counsel on both sides, and the jury returned a verdict in favour of the plaintiffs.

The defendants now moved for a new trial, on the ground of a misdirection, and *Mr. S. A. Foot*, in their behalf, contended,

I. That the testimony as to the offer made on each side, when the plaintiffs informed P., W., K. & Co. that the note in question had been stolen, was admissible in evidence.

II. That the note was dishonoured when the plaintiffs took it, and the same defence ought to have been allowed against them as against the robber. The note was like any other note, and was dishonoured at the time of the demand. It was due after 60 days, and whoever took it after it was due, took it subject to all the equity existing in favour of the true owner.

III. By the last indorsement, the negotiability of the note by order, had been restored. It was made payable to S. & M. Allen, and as they never endorsed it, that circumstance, if not conclusive against the holders, was enough to put every taker upon inquiry. The words, "payable on demand," mean nothing more, than that the note should be presented at the bank for payment. But to make the note available to any person besides

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holders cannot sue in their own names without such endorsement, and upon this ground the plaintiffs must fail.

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IV. The plaintiffs were not holders of the note for a valuable consideration. They seek to recover in their own right, and not for Prime, Ward, King & Co. : they must, therefore, be *bona fide* holders, for a valuable consideration, without notice that the note was a stolen one. But it is not pretended that they purchased the note, or that they parted with any thing valuable for it, when it was received. The note was taken for safe keeping, and the plaintiffs were mere bailees for the depositors. It appears in evidence, that the depositors offered to take the note back again, if the plaintiffs' messenger would make oath that it was received of Prime, Ward, King & Co. This is conclusive proof, that as between the bank and the depositors, there was no dealing which made the deposit conclusive and irrevocable. If the plaintiffs, then, had satisfied P., W., K. & Co. that the note had been received from them, they would have redeemed it, and the plaintiffs were bound to make the proof required.

This is not the case of a forged note, which has been taken by the bank from which it was issued, and passed to the credit of a customer in his bank book, for in such case the credit is conclusive between the parties, we admit. But that rule is founded upon a principle of policy and convenience, which requires the bank to know their own notes, and they receive them at their peril. Here the plaintiffs passed to the credit of P., W., K. & Co. a note of the defendants, to which it was supposed the depositors had good title. If it shall appear that Prime, Ward, King & Co. could not collect the note of the defendants, then the plaintiffs are not bound or concluded by the credit given to the depositors in their books. The credit may be stricken from their accounts, and the plaintiffs could never have been compelled to pay P., W., K. & Co. the amount of a note, which they could not collect of the defendants.

The rule is, that a note like this, which has been lost or stolen, is good and valid in the hands of an innocent purchaser or taker,

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who has received it *bona fide* for a valuable consideration, and without notice. The defect of the plaintiffs' title is here; they have never paid any thing for the note, nor have they been prejudiced by it. There has always been a large balance in their hands belonging to P., W., K. & Co. ever since the note was deposited. The means of redress and protection are in their own hands, and they are not liable to pay over the amount of the note to the depositors, as the proof now stands.

If this defence prevail, then Prime, Ward, King & Co. will be driven to the necessity of asserting their title to the note; and if they took it under such circumstances as bring them within the rule relative to such notes, they will recover. But if they took the note for collection merely, without ever having paid any thing for it, and without having been prejudiced thereby, then their title will fail, and the person from whom they received it, must assert his claim. By this means, the note may be traced back to the robber, and it may appear that no consideration has ever been paid for the note since the day it was feloniously taken from the true owner. This is the true rule of law governing these cases, and it is the just policy of the law, not to allow a person to collect a lost or stolen note merely because he happens to be the holder of it. [*Bay v. Coddington*, 5 Johns. C. R. 58. 20 Johns. R. 644. same case. *Buller v. Harrison*, Conn. 566. *Cox v. Prentiss*, 3 Mass. and Sel. 345. *Lafarge v. Newland*, 7 Cowen R. 461. *Mowatt v. McLellan*, 1 Wend. R. 178. *Kent's Com.* vol. 3, p. 51.]

Mr. B. R. Ward and Mr. J. Hoyt, for the plaintiffs, contra, contended,

I. That the plaintiffs were to be considered as *bona fide* holders of the note for a valuable consideration, and without notice that it had been feloniously taken from the true owners. Prime, Ward, King & Co., at the time when they deposited the money, presented their own bank book to the plaintiffs, who passed the amount of this note among others to their credit thereon. This book, then, contains an admission in writing on the part of the plaintiffs, that they had received of P., W., K. & Co., not a spe-

cific note for collection, but a sum of money : and this particular sum even, was not a specific entry by itself, but was included in a much larger sum, deposited at the same time, and carried to the credit of Prime, Ward, King & Co.

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This bank book, under these circumstances, contains *conclusive* evidence against the plaintiffs, that they owe the depositors a sum of money ; and if an action were brought against the bank, to recover the amount thus admitted to be due to P., W., K. & Co., the evidence furnished by the book could not be controverted or gainsayed by the bank. If this proposition be correct, then it follows, that the plaintiffs are *bona fide* holders of the note for a valuable consideration, that is, their liability to pay P., W., K. & Co. a like amount with that deposited, is a sufficient consideration to maintain their title to this note.

The money received by the plaintiffs of the depositors, was received in the ordinary course of business. *Prima facie*, at least, the bank owes the amount deposited, and it would be a most inconvenient and mischievous rule to throw upon *them* the burthen of proving that the note in question was a stolen note. Prime, Ward, King & Co. demand of the plaintiffs the amount of their deposit : the plaintiffs reply, that the amount passed to their credit is incorrect ; that one of the notes received by the bank as cash, was, in fact, the property of S. & M. Allen, from whom it had been stolen, and that, therefore, the depositors are not entitled to recover the amount, which the bank has admitted to be due. If the bank set up this defence, must they not prove it ? And can it be either a just or prudent rule, which shall subject the depositary to this hardship and inconvenience ?

But the entry upon the bank book is *conclusive evidence against* the bank, in favour of P., W., K. & Co., and the plaintiffs are therefore *bona fide* holders of this note, and entitled to recover. [4 Johns. R. 389.]

II. But if this were not so, the plaintiffs may yet recover upon the strength of P., W., K. & Co.'s title. There is no pretence that *they* are not *bona fide* holders ; for the evidence is, that they

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could not tell from whence they received the note. They, of course, gave value for it, for bank notes pass between man and man as cash. If the bank are bailees or trustees of P., W., K. & Co., then they may repose upon *their* title, and upon this ground, the plaintiffs are entitled to recover. The defendants received value for their note when they issued it, and, of course, they are liable to pay somebody; and who the receiver is, cannot be material to them. [*Smith v. The Merchants' Bank of Albany*, 19 Johns. R. 115.]

III. The plaintiffs, when they took the note, had nothing to put them on their guard. The notice of the robbery never reached them, and they are not to be visited by any constructive notice. Handbills were issued, but they were not shown to the plaintiffs, and the ordinary course of publishing an account of the robbery in the newspapers, was not resorted to. Hence it is clear, that the bank has received no direct or positive notice, and there was nothing to put them on inquiry. This point is not much relied on by the defendants, and evidently cannot be maintained. [*Chitty on Bills*, p. 26. 151. *Edi. of 1826.*]

IV. The note is not a negotiable note, in the meaning of the term adopted by the defendants: that is, its negotiability does not depend upon endorsement, after the payee has put his name upon it. For the sake of remittance or security, post-notes are payable to order, and at a future day. But the instant they are endorsed and become due, they are *money* for all the ordinary purposes of business. They do not differ from other bank notes in this particular, but would be good as a tender in payment of a debt, if not objected to. The title of the plaintiffs, then, does not depend upon endorsement, but upon delivery; and being holders of the note, they can maintain this suit in their own names.

HOFFMAN, J. (After stating the facts of the case.) It is not denied, on the part of the plaintiffs, that the note upon which this action was brought, was feloniously taken from the public mail at or near Charleston, in South Carolina, on or about the



22d of February, 1827, after it had been deposited therein, for the purpose of being remitted to New-York. It is equally clear and undisputed, that S. & M. Allen; the persons to whom the note was remitted, were its true owners, and they, in the name of the Phoenix bank, interpose this defence for the purpose of protecting their own rights. The defendants upon the record, are indifferent as to the result of this action, having been indemnified by S. & M. Allen against its consequences. Being, however, the makers of the note, and having received value for it, the defendants must, of course, pay its amount to somebody; and it is of no importance to them whether payment is made to the plaintiffs, or to S. & M. Allen.

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The defendants, therefore, are not, as to its practical results, interested in the event of this suit, but S. & M. Allen are, and the first question is, whether they can be permitted to interpose this defence in the name of the bank.

It is a rule of law well settled, that possession of a promissory note, endorsed in blank, or payable to bearer, is *prima facie* evidence of ownership, and if the person or party having the possession, came by it *bona fide*, for a valuable consideration, in the course of his business, and without any accompanying circumstances of suspicion to put him upon his guard, or excite inquiry, he shall hold the note against the original owner, even if it had been lost or stolen. But it is equally well settled, that if the holder of the note received it under circumstances which ought to put a man of ordinary prudence upon his guard, or, at least, upon inquiry; or if he came into a possession of it without having parted with any thing of value, or without having given some new credit in exchange for the note, then the maker may, under proper equitable circumstances, set up a defence against his right of recovery. [*Bay v. Coddington*, 5 Johns. Ch. Rep. 56. *Gill v. Cubitt*, 3 Barn. and Cresw. 466. and the cases there cited.]

In the case of *Gibson v. Talman*, decided in this court, it was held, "that if the holder of a note obtains it by fraud, he cannot maintain an action upon it against any of the parties to it. He must aver and prove that the note was transferred to him, and though his possession of the note is *prima facie* evidence of the

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"transfer, yet if the defendant can show that the plaintiff obtained the note by his own fraudulent act, he has a right to defeat the action on *that ground*, although he may be liable to pay the *note to the true owner.*"

The principle of that decision is applicable to this case. The plaintiffs here must recover, if they recover at all, by the strength of their own title, and if they have no right to the note, as against the claims of the original owners, they cannot recover upon the ground that the defendants are liable to *somebody*. The main question, then, to be decided, is, whether the plaintiffs are *bona fide* holders of this note; whether they have paid any value for it, or given credit upon the faith of it, or incurred any new responsibility by reason of their possessing it. That they came into the possession of this note in the ordinary course of their business, and without any circumstance to cast the slightest suspicion, in their minds, upon the title of those who made the deposit, cannot be denied; and the point upon which this case must turn, will depend upon the question of consideration entirely.

It appears from the evidence, that Prime, Ward, King & Co., at the time when the note was deposited, were creditors of the bank to a considerable amount, and have continued to be so since. They have at all times since the deposit, had funds in the Fulton Bank, subject to their order, to an amount far exceeding the amount of this note, and the plaintiffs cannot, therefore, by any possibility, be prejudiced by the claims of S. & M. Allen, unless Prime, Ward, King & Co. could recover the amount of this deposit of *them*.

It cannot be successfully contended on the part of the plaintiffs, that they, at the time when the note was received in deposit, parted with any thing of value in exchange for it, or that they gave any *new* credit to Prime, Ward, King & Co., upon the mere *faith* of the note, or that they have, at any time, withdrawn the amount. For, if those who made the deposit, had afterwards drawn out the money from the bank, there can be no doubt, that in such a case, the plaintiffs would be treated as *bona fide* holders for a valuable consideration, and entitled to recover. But the fact

is not so. P., W., K. & Co. have not withdrawn their money from the hands of the plaintiffs ; but a sum remains there now, more than sufficient to indemnify them, and which they have a right to retain, unless they are concluded by some act of *their own*.

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When the note in question was deposited with the Fulton Bank, they received it voluntarily of P., W., K. & Co., and gave them credit for a like amount in their books. It will be observed, that the plaintiffs were not bound to receive this note in deposit, or as payment of any antecedent debt, and they might have refused to receive any thing but cash. The note was, then, merely deposited with the plaintiffs in the usual course of business, for collection ; and the question is, whether their own acts, or the credit given to P., W., K. & Co., in their own book, and in the books of the bank, shall be held as *conclusive* evidence, that the plaintiffs were indebted to them to the amount of the credit. If this be so, then beyond all doubt, the plaintiffs have given *new credit* upon the faith of the *specific* note, and may be prejudiced to the full extent of its amount, by their liability over to Prime, Ward, King & Co.

I cannot allow this potential effect to the mere act of giving credit upon the books of the bank, or those of their customers ; and I do not admit that the plaintiffs would have been concluded by any such entries. It may be, that entries made by banks upon the books of their customers, are considered by their officers as *conclusive and irreversible* : but the law does not look upon these acts with the same stern eye. The entry, it is true, being made by the bank, may be *conclusive as to amount*, where money has been deposited ; but not so in a case where the bank receives nothing of value, except in particular cases hereafter to be noticed. This note, when deposited, was treated by the plaintiffs as a representative of fifty dollars, and they, therefore, gave credit to P., W., K. & Co. on their books, for a like amount. But when the note was presented for payment, the makers refused to pay it, upon the ground, that its true owners were not its holders. The plaintiffs, at the time of this refusal, had an open account with P., W., K. & Co., and might have erased the credit previously given, or have entered a like sum to their debit, by which means these accounts would have conformed to the truth of the case.

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In the case of *Garland v. The Salem Bank*, [9 *Mass. R.* 406.] the endorser of a promissory note, being ignorant that by the rules of law, he was not bound to pay the note for the want of a proper demand of the maker and notice to himself, paid the amount of it to the defendants, with whom it had been left for a collection by the holder, and the bank passed the money to the credit of the holder on their books, as so much money deposited by him. Three days thereafter, the endorser discovered his mistake, and that the amount of the note had not been paid over to the holder in any other way, than by its having been passed to his credit on the books of the bank. He thereupon demanded the amount back again; but the bank refused to comply with his demand, and subsequently paid the money over to the holder who deposited the note, upon his check.

Upon action brought by the endorser for money had and received, it was held that the note had been paid by mistake by the endorser, under a misapprehension of his rights; that the entry to the credit of the holder, was not conclusive upon any of the parties, and that the bank might have corrected their accounts after the mistake was discovered. The endorser, therefore, had a verdict for the amount of the note. In this case of *Garland v. The Salem Bank*, it was contended, that the payment by the endorser to the bank, and the transfer to the credit of the holder, who made the deposit, amounted to an effectual and irrevocable transfer, according to the course of bank business. The court, however, considered that the mere act of giving credit on the books of the bank, under the circumstances of the case, did not amount to such a transfer, and the bank could have successfully resisted an action brought by the person in whose favour the credit was made.

The principle of that case is applicable to this, and shows, that the credit given by the Fulton Bank to Prime, Ward, King & Co. was not conclusive nor irreversible. It was, as it stood, evidence *prima facie* against them, but not conclusive.

This view of the subject raises the question, whether Prime, Ward, King & Co., could recover the amount of this deposit of the plaintiffs, and whether they may not recover for the benefit of

Prime, Ward, King & Co. It will be observed, however, that the Fulton Bank reposes upon the strength of its own title, and the plaintiffs do not claim to be the mere agents of Prime, Ward, King & Co., or to sue for their benefit. The plaintiffs, in fact, put their right to recover upon the exclusive ground, that the credit given to their customers in their book, is conclusive upon them, and that, *therefore*, they are holders for a valuable consideration. As I view the subject, the plaintiffs are under no such responsibility. They received the note as the bankers of P., W., K. & Co., and for their accommodation. In that character they presented the note to the defendants, and payment being refused, they could return the note to P., W., K. & Co.

If the plaintiffs had taken a forged check in the name of a dealer, drawn upon themselves by mistake, and had passed the amount to the credit of another customer, it might have made a different case; for there the law might cast upon them the responsibility of knowing the handwriting of the person who made the check. Bankers are supposed by the law, to be acquainted with the signatures of their correspondents and customers, and all the consequences of mistake in such cases are cast upon them. So in cases where their own notes, or notes purporting to be their own, are presented at the counter of a bank for payment: there the law presumes that the officers of the banks know their own paper, and can discriminate between spurious and genuine notes. If *they* cannot, who can? If *they* receive a forged note as a genuine note of their own issuing, they must sustain the loss. [*Bank of the United States v. The Planters' Bank of Georgia*, 10 *Wharton* p. 333.; and the cases there cited.] The rules applicable to that class of cases, however, do not apply here, as I apprehend. The law does not throw upon these plaintiffs any peculiar responsibility, and their entry upon the customer's book, although *prima facie*, is not conclusive evidence against them.—If P., W., K. & Co. were to bring an action against the Fulton Bank for the amount of this deposit, and were to exhibit the bank-book in evidence, then the bank would be at liberty to show all the circumstances of the transaction and that payment of the note, when it was presented to the Phoenix Bank, was refused. It

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is said, that it already appears, that those who deposited the note are innocent and *bona fide* holders, and that a controversy with them on the part of the plaintiffs would be unavailing. In reply, it may be observed, that there is no proof now before the court which establishes that fact. We have nothing upon that point, except the evidence of Mr. Ward, and it might be that on a proper occasion, S. & M. Allen could show the circumstances under which the note was taken by P., W., K. & Co.

If the credit given to those who deposited the note, is conclusive against the bank, it is conclusive upon the ground, that an entry in the bank-book is final, as between the bank and its customer; that it is an act done which can never be remedied, a step taken which cannot be retraced. Suppose the robber himself was the person who made the deposit: could he by this indirect means, possess himself of money which he could not obtain directly? If the robber were to sue the defendants, they might refuse to pay him and show his want of title;—and can it be, that by the mere act of placing the note in a bank, as a deposit, he can thereby securely enjoy the fruits of his felony? This statement, to my mind, carries with it the proper answer. At all events, in a suit against them, after the fact is established, that the note in question was the property of S. & M. Allen, and that it was stolen, P., W., K. & Co. would be compelled to shew the manner in which they became possessed of it. It may be they took it of a stranger without enquiry, and without due caution; for it is said, they know not from whom the note came to them. It may be that they received it of Gates & Co. for collection merely, and have never been prejudiced. By this means, the note will be traced back to the robber, and if no person can show himself to be a *bona fide* holder of it, in the legal acceptation of the term, then there can be no recovery against the rights of the true owner.

It being established, that the plaintiffs are not such holders of the note, as can recover by the strength of their own title, it follows that this defence may be set up by the Phoenix Bank. It certainly may, under the circumstances of this case; for here S. & M. Allen appear and interpose their just rights. This is a suffi-

cient justification of the bank, and authorizes them to refuse payment. We may, however, go further. It is true, the Phoenix Bank can have no preference, as to whom they will pay the amount of the note, since they have promised to pay the *holder*. Nevertheless, they are under no obligation to pay any person, who is not a *bona fide* holder. If they could show that the note was stolen or lost, and that the holder of it came into possession of it without paying value for it, in any sense of the word, they would be justified in refusing payment. They ought to withhold the money from the person, who had no just title to it, and become trustee, or fiduciaries for the real owner, whenever he may appear. By this means, no injustice would be done, and the rights of innocent persons would be best preserved.

Under this view of the subject, as there must be a new trial, it is not necessary to examine the other points made by the counsel for the defendants. But, in regard to the second and third points made by them, I do not consider post-notes, issued by a bank, as subject to all the technical rules attached to ordinary bills of exchange and promissory notes. Post-notes are intended to circulate like other bank notes, after they become due, and are treated as such for all convenient purposes. True it is, they are payable to order, and must be endorsed to give them negotiability. In this case, the note was endorsed by Grosvenor, the payee, in blank, and it was payable 60 days after date, *on demand*. When it became due, the makers were bound to pay it, at whatever period of time (within the statute) it might be presented. As between a *bona fide* holder and themselves, they had no equity to set up by way of defence; and it is a misapplication of the rule relating to notes over due, to apply it to a case like the present one. He, who takes a note over-due, takes it, it is said, subject to the equities existing between the original parties. And who are the original parties in this case? The Phoenix Bank and Grosvenor—the makers and the payee. And what equities are there existing between *these* parties, which the *defendants* can set up? None whatever. The note, when endorsed by Grosvenor, had perfect negotiability, and could afterwards pass by mere deli-

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very. The names of all endorsers after him could be erased, without injury to a perfect right against the makers.

Without noticing the first point made by the defendants, I am of opinion, that the second and third points, on which their application for a new trial rests, cannot be sustained; but upon the *fourth*, I consider the application well founded. I do not view the plaintiffs as *bona fide* holders of the note for a valuable consideration, as the proof now stands; and as they cannot recover until that be shown, there must be a new trial.

*New trial granted.*

[Ward and Hoyt, *Att'ys for the plffs.* Foot and Kent, *Att'ys for S. & M. Allen.*]

Vide *McLaughlin v. White*, 5 *Wend. R.* 404.

*Note.*—This action was finally abandoned by the plaintiffs, and the cause was never again brought to trial.



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versus

OLIVER M. LOWNDES, Sheriff, &c.

Where the sheriff has endorsed upon an execution the day and hour when it was received, the endorsement is conclusive evidence of the fact, that the execution was in his possession at that time ; and when he has assumed to act under it, he cannot compel the creditor, who has sued him for a false return, to prove at the trial the identity of the execution, either by witnesses or collateral testimony.

Where goods are in the hands, and under the controul, of the defendant in the execution, and they are pointed out as his property to the sheriff, by the creditor, the Sheriff is bound to levy upon them, without an indemnity ; and if he neglect to do so, and the goods are afterwards removed beyond his reach, by the defendant in the execution, he will be answerable to the creditor for his neglect.

If, after a levy, a claim to the goods be interposed by a third person, the sheriff may then demand an indemnity before he can be compelled to proceed further ; and his regular course would be, to call a jury *de proprietate probandi*. If he make the levy and follow this course, he will not be liable for a trespass, and the parties claiming the goods may be compelled to litigate their claims, and decide the question of property, before the sheriff can be compelled to make his return, or proceed to a sale.

*Quære.* Whether the deputy, who makes the levy can be compelled to testify as to the identity of the execution, in an action against the sheriff for a false return ; and whether he be not incompetent as a witness, for any purpose connected with the action ?

The property in goods in a store, conveyed to a third person by an instrument of assignment, dated after the docketing of a judgment against the assignor, and left in his hands, without any good reason shewn therefor, does not pass to the assignee, and the assignment itself is fraudulent and void. The presumption, in such cases, is, that the assignment was made to defeat the judgment, and it will not be upheld.

THIS was an action on the case, for a false return on a writ of *fieri facias*, at the suit of the plaintiff, against one Samuel B. Hickcox. The declaration contained two counts. The *first count* stated, that the plaintiff obtained a judgment in the Supreme Court of this state, at the term of October, in the year 1826, against Samuel B. Hickcox, for \$10,000 of debt, and \$17.13 cents costs ; that afterwards, to wit, on the 20th of October, 1826, a writ of

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*fiery facias* was issued thereon, directed to the sheriff of the city and county of New-York, returnable on the third Monday of February, 1827, on which there was an endorsement, directing the sheriff to levy and collect \$969.98, with interest thereon from the 16th day of December, 1826, besides the sheriff's fees, &c. which writ, so indorsed, was afterwards, to wit, on the 29th day of December, 1826, delivered to the defendant in this suit, to be executed in due form of law; that by virtue of said writ the defendant afterwards, to wit, on the same 29th day of December, 1826, siezed and levied upon divers goods and chattels of the said Samuel B. Hickcox, within the said city and county of New-York, sufficient to satisfy said execution; but the defendant had not the monies required to be levied by virtue of said writ, before the said Supreme Court, at the return day thereof, and at the return day the defendant falsely returned to the Supreme Court upon said writ, that said Hickcox had no goods or chattels in his bailiwick, &c.

The *second count* stated the judgment and *fi. fa.* as before: and that Hickcox had goods and chattels, on which the defendant might have levied, &c., but that the defendant, being sheriff, &c., neglected to sieze and take the same, and falsely returned that said Hickcox had no goods or chattels, &c.

The defendant pleaded the general issue.

This cause was originally commenced in the Supreme Court, but by consent of parties, was transferred to this court, and brought to trial before Mr. Justice HOFFMAN and a jury, on the first day of December, 1828.

On the trial, the plaintiff offered in evidence, an exemplified copy of a judgment in the Supreme Court, in favour of himself against Hickcox, for \$10,000, of debt, and \$14.29 costs, entered upon a bond, warrant of attorney and plea of confession; and docketed on the 16th day of December, 1826. The plaintiff also offered in evidence an exemplified copy of a writ of *fiery facias*, upon a judgment in favour of himself against the said Hickcox, in the same court, and of the same date, for \$10,000, of debt and \$17.13 costs, (the plaintiff's and defendant's costs of entering up the judgment on warrant of attorney being both included in the *fiery facias*.) tested the 8th day of October, 1826, and returnable

on the third Monday of February, 1827, with directions endorsed, to levy \$952.85 of debt, and \$17.13 costs, with interest from the 16th day of December, 1826, besides fees and poundage. "On the *fieri facias* appeared the following endorsements, viz. "Rec'd. "Dec. 29th, 1826, at 12 o'clock, at noon—no goods, chattels, lands or tenements.—O. M. Lowndes, sheriff. (Filed 7th April, 1827.") The counsel for the defendant here raised an objection on the ground of variance; the amount of costs mentioned in the record of judgment and the *fieri facias* not being the same. This objection however was overruled by the Judge, and the record and *fa.* were admitted in evidence accordingly.

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The plaintiff then called one Decius Rice as a witness, who testified, that he was a clerk in a retail dry goods store of *Samuel B. Hickcox*, No. 121 Chatham-street, in the city of New-York, from July, 1826, till the 1st of January, 1827; that on Saturday, the 30th day of December, 1826, about noon, *Jacob Westervelt*, a known and reputed deputy of the defendant, came into the said store in company with *Trueman Roberts*; and *Westervelt* then told the witness that he had an execution against the property of *Hickcox*, and requested the witness to send for him, as he was not then in the store; and the witness accordingly requested one *Joseph Hopkins* to go for him. *Roberts soon after left the store, and went away*; but the deputy sheriff remained there about an hour, and then *Hickcox* came in. The deputy then told him that he had an execution against his property; upon which *Hickcox* stated to the deputy, that he had assigned all the goods in the store to one *Frederick A. Stewart*, and that the goods all belonged to him. He further testified, that while the deputy sheriff remained in the store, he (the witness) continued to sell and deliver parcels of the goods to customers as usual, to which the deputy made no objection. That at the time when the deputy sheriff entered the store, there was a sign-board over the outside door, on which was the name of *Hickcox*; which sign had been there during all the time of his clerkship. He further testified, that the said deputy left the store without making any inventory, or giving any directions concerning the goods; and the store was closed that night by the witness as usual, it being Saturday night.

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There were then in the store goods of the value of \$1500 and upwards; but on the Monday next following, he found that the goods had all been removed. In about six days thereafter, the witness and Hopkins, at the request of Hickcox, went with him to a store in Grand-street, where Hopkins and the witness, at the request of Hickcox, took an inventory of the *same* goods, and delivered it to Hickcox. He knew not what became of these goods, except that about a month afterwards, he was employed by Hickcox to carry about \$100 or \$200 worth of the same goods and pledge them to the Lombard Association, in order to raise money for him, which service the witness performed accordingly. He never heard of any claim or right of Stewart to said store of goods, until after the deputy sheriff came with the execution, and he continued to act as clerk to Hickcox, and to sell the goods in the store, from the 24th to the 30th December, 1826, inclusive, as he had done before, without any knowledge or information of said assignment.

The counsel for the defendant then objected, that the plaintiff had not given any evidence to show, that the execution so proved to have been in the hands of the deputy sheriff, was the *same* as that given in evidence in this cause; but it was insisted by the plaintiff's counsel, that the evidence was *prima facie* sufficient on that point. The presiding Judge decided, that the plaintiff was bound to give further evidence as to the *identity* of the writ of *feri facias*; to which ruling the plaintiff's counsel excepted.

The plaintiff then called the said Frederick A. Stewart, who was asked, whether the deputy sheriff, between the issuing of said execution and the return day thereof, had not declared, that he had in his hands an execution at the suit of the plaintiff in this cause against Hickcox? To which he answered, that he understood from the deputy, that Trueman Roberts was the party, who claimed the benefit of that execution, and he did not hear the name of Henry A. Williams mentioned.

The plaintiff then called *Jacob Westervelt*, the said deputy sheriff, as a witness, to prove the *identity of the execution*; that is, to prove that the *fi. fa.* given in evidence, was the same with that, which he had in his possession when he entered the store of Hick-

cox, on the 30th December, 1826, as stated by the witness, April Term,  
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The defendant's counsel then made a preliminary inquiry of Westervelt, who testified, that he was a deputy of the defendant during the whole time, from the teste to the return of said execution; that, as such deputy, he had given a *bond of indemnity to the defendant, as his principal in the office of sheriff*, which was then in full force, and so continued. That he was the real party defendant, and had employed counsel to defend this suit, and was bound to pay all damages, which might be recovered against the defendant; and he objected to answer, as a witness, to the inquiry proposed to be made by the plaintiff, on the ground, that he was the real party defendant in interest, and also, that his answer might establish, or tend to establish, that he was liable to a civil suit, under his bond of indemnity to the defendant. The Judge overruled this objection, and decided, that the witness was bound to answer the question, and the counsel for the defendant excepted to his opinion on that point. The witness then testified, that he had in his hands the writ of *fieri facias* produced at the trial, at the time when he entered the store of Hickey, as testified to by Rice. That one Trueman Roberts claimed to be the assignee of said judgment, and went with the witness on that occasion, to the store, and directed the levy of the execution on the goods. He further stated, that when he was on his way to execute said writ, he mentioned to Roberts, that if any claim should be made to the goods, in opposition to the execution, he should require an indemnity from the plaintiff; to which Roberts answered, that a bond of indemnity should be given during the then next week, if required. He further stated, that on Friday, the 6th day of January, 1827, he saw the bond of indemnity on file in the sheriff's office; which bond was produced by the defendant at the request of the plaintiff. He also testified, in answer to questions put by the defendant's counsel, (and which were objected to by the plaintiff, on the ground of his interest,) that *on the 6th of January, 1827*, the defendant delivered the bond of indemnity to the witness, and directed him to inquire as to the sufficiency of the obligors; that he made inquiry, and was informed, that they were

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not good, and he so reported to the defendant ; but that no notice thereof was given, nor was any objection ever made to any person, to his knowledge, as to the insufficiency of the obligors. He further testified, in answer to an inquiry made by the defendant's counsel, (which was objected to by the plaintiff's counsel, on the ground of his interest,) that the goods were removed from the store of Hickcox, in the night of Monday the 1st day of January, 1827, without his knowledge or consent. Upon a like inquiry by the defendant's counsel, and on a like objection by the plaintiff's counsel, Westervelt also testified, that after the witness went to the store of Hickcox with the execution, on the 30th December, 1826, Stewart came there in company with Hickcox, and Stewart then claimed the goods by virtue of an assignment from Hickcox to him.

The plaintiff then gave in evidence, the bond of indemnity to the sheriff, executed by the plaintiff and Roberts, and rested his cause.

The defendant's counsel then gave in evidence, an instrument of assignment from Hickcox, in the words and figures following, to wit : "Whereas, I am indebted to Frederick A. Stewart, of the city of New-York, in the sum of *one thousand dollars*, lawful money, of the state of New-York, for cash advanced to, and for me, by him, and whereas, I am anxious to pay or secure the payment of the same to him : Now, Know all men by these presents, that I Samuel B. Hickcox, of the city of New-York, for the final payment of the said one thousand dollars, so far forth as I am able, do hereby assign, transfer and *deliver* to the said Frederick A. Stewart, all of the goods, chattels, furniture, and other personal property now in the store, known as number one hundred and twenty-one, Chatham-street, in said city of New-York, and also the goods, chattels, and furniture, situate in the house, number eleven Reed-street, in said city, hereby giving the said Frederick A. Stewart, full power and authority to sell and dispose of all of the said goods, chattels, and furniture, and from the proceeds thereof, I do hereby authorize him, the said Stewart, to retain a sum sufficient to pay and satisfy the said one thousand dollars, and the balance, should any re-

"main in his hands, I do hereby authorise the said Stewart to  
 "retain in his hands, *for the benefit of my creditors generally*, to  
 "be paid to them, in proportion to their respective debts or de-  
 "mands; and I do hereby authorise the said Frederick A.  
 "Stewart, to sell the same at private or public sale, as he may  
 "judge best, for the promotion of the above object. In witness  
 "whereof, I have hereunto set my hand and seal, the *twenty-fifth*  
 "day of *December*, 1826.

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(Signed) "SAMUEL B. HICKCOX. [L. s.]

"In the presence of }  
 J. B. STEWART." }

The only proof of the assignment, was derived from the evidence of Thomas Drumgold, who testified, that J. B. Stewart, the only subscribing witness, was dead, but that his name as a subscribing witness to said instrument, was in the proper handwriting of the said J. B. Stewart. The defendant's counsel also proved, that at the date of said assignment, Hickcox was indebted to Stewart in about the sum of \$700.

The defendant then called a witness, who testified, that in January, 1827, Trueman Roberts and Samuel A. Williams, the obligors, in said bond of indemnity, resided in the city of New-York; that Williams was then reputed to be insolvent: and that Roberts was a merchant in good credit, although he had, some time before, been connected with a house that stopped payment.

The defendant then called Westervelt again, and inquired of him as to the solvency of the said obligors; to which inquiry the plaintiff objected, on the ground of interest in the witness, but the objection was overruled; and the witness answered, that at the period of the giving of the bond of indemnity, he made inquiry by direction of the defendant, as to the solvency of the obligors, and was informed that Williams was reputed to be insolvent; and that Roberts was embarrassed and of doubtful credit.

It was then agreed, that a verdict should be entered for the plaintiff, subject to the opinion of the court upon a case to be made; and the Judge, thereupon, charged the jury, that they had

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a right, in their discretion, to allow interest upon the sum claimed, or not, as they thought proper, under the circumstances of the case; and the jury found a verdict for the plaintiff for the sum of \$969.98 damages, that being the amount directed to be levied on the execution, without interest.

The cause was argued by *Mr. J. Platt* for the plaintiff, and by *Mr. Slosson* for the defendant.

*Mr. Platt* contended,

I. That the variance between the judgment and the *feri facias*, in the amount of costs, was immaterial, and that the objection was properly overruled. In *Bissell v. Kipp*, [5 John. 89.] in an action for an escape, there was a variance in amount between the judgment and the *ca. sa.* and the court held, that "process was a sufficient warrant for the sheriff; and that he could not take advantage of the defect in this collateral way."

It being a judgment on bond and warrant of attorney and cognovit, the mistake is *formal* merely, and not a matter of substance. The defendant's, as well as plaintiff's costs, were recoverable out of the penalty, and properly collectable on the *fi. fa.* In *Mills v. McCoy & Wife*, [4 Cowen, 406.] the court said, "if a variance be substantial, and such as could not be amended," the objection did not come too late, although made after summing up to the jury: but "if it was *merely formal*, the objection in any stage was good for nothing." That was a variance in the record too, which was held not material in substance, and overruled.

The rule is, that whenever the error is *amendable*, the mistake cannot be taken advantage of in this collateral way; unless the proceedings were set out in *hæc verba* in the pleadings; which is not the case here. [*Rees v. Overbaugh*; 4 Cowen, 124.,] *Lion ex Dem. Eden v. Burtis*, [18 John. 510.]

If the defendant in the original suit, has waived error or irregularity in the judgment or execution, the sheriff is justified, in executing the process, and shall not be allowed to question it in



action for an escape or false return. [*Jaques v. Cesar*, 2 *Saund.* 101 (a.) *Jones v. Pope*, 1 *Saund.* 38, *Note 2. Bull v. Steward*, 1 *Wils.* 255. *Bentley v. Donnelly*, 8 *D. & E.* 127.]

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II. The sheriff's endorsements on the *fi. fa.*, "Received December 29th, 1826," and "No goods, chattels, lands or tenements, O. M. Lowndes sheriff," were sufficient and conclusive to prove, that this execution was in the sheriff's hands on the 30th December, when it is proved that Westervelt, the deputy, was requested by *Roberts*, (the assignee of the judgment,) to levy on the goods of the defendant in that execution. It also appearing, that the *fi. fa.* was returned and "filed on the 7th April, 1827,"—it must, therefore, have been in the sheriff's hands on the thirtieth December, one thousand eight hundred and twenty-six, when the deputy ought to have levied on the goods pointed out to him; and it is immaterial whether the deputy had the execution in his own hands, or whether it lay in the sheriff's office; his powers and duties were the same in either case. The ruling of his honour, the Judge, requiring further proof of the identity of the execution, under which the deputy acted, was erroneous; and the plaintiff had completely made out his case, independent of the testimony of *Westervelt*, the deputy.

Executions in the Supreme Court are, almost necessarily, sent by letter to the sheriffs throughout the state; and if the endorsement required by law, as to the time of its coming into the sheriff's hands, is not to be evidence against the sheriff, as to that fact, the object of the law would be defeated, and suitors would be subjected to extreme hardship and inconvenience.

Here we prove by the indorsement, that the sheriff had this execution on the 29th December, 1826; and that the next day his deputy, under the direction of the plaintiff, (the assignee of the judgment,) went to the store of the defendant in that execution, for the purpose of executing a *fi. fa.* on the goods of that defendant; is not the inference irresistible, that the deputy assumed to act under this execution, there being no evidence of any other?

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III. *Westervelt* was legally required to answer to the question put to him by the plaintiff's counsel, as to the identity of the execution, which was explained by the plaintiff's counsel, to be the only object of inquiry on his part.

In *Lord Melville's Case*, in the House of Lords, it was decided, (upon the opinions of the Lord Chancellor, and eight Judges against four Judges,) that "a witness cannot by law refuse to answer a question relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatever,) on the ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit." [1 *Phil. Ev.* 208. 1 *Am. L. Journal*, 228. *Anthony's N. P.* 101. *Note.*]

The rule is founded in justice, convenience and wisdom. If it be decided, that *Westervelt* is *not compellable* to answer to that inquiry at law, the plaintiff would have an unquestionable right to his answer, on a bill of discovery, to be used in this suit, (the sheriff also being made a party to such bill;) and *cui bono*, put the plaintiff to this circuitous and expensive mode of obtaining his testimony? He is not a party to the record; and why allow him the technical privilege?

The cases of the *People v. Irving*, [1 *Wendell*, 20.] and *Mauwan v. Lamb*, [7 *Cowen*, 174.] are distinguishable from the present case.

Those cases decide, that the *real and immediate party in interest*, though not a nominal party on the record, is privileged from being a witness against his immediate interest.

Here *Westervelt* swore, that he was "the real party defendant," and that he was "bound to pay all damages, which may be recovered in this suit." But it must be remarked, that the witness here improperly swears to *inferences of law*, which proves nothing. The question is for the court, upon the *facts* disclosed, whether he is, in judgment of law, the real and immediate party defendant. He is not the real defendant in fact, although the recovery in this suit, may *consequently*, subject him to an action by his principal. A new suit or action must be brought between different

parties, in order to subject the deputy sheriff. There is a difference between a party having an interest as *plaintiff*, or as *defendant*. The cases above cited, (in *Cowen and Wendell*,) were of the former description. The assignee of a bond, though not a party on the record, will be regarded by courts of law, as the *actual plaintiff* for any purpose. But a court of law never can recognise any person as actual defendant, except the defendant on the record.

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IV. The assignment by *Samuel B. Hickcox*, (the judgment debtor,) to Frederick A. Stewart, dated 28th December, 1826, was *fraudulent in fact* and in *law*, as against the plaintiff, whose judgment was docketed on the 16th December, 1826.

There is no colour for the proposition, that this assignment was in the nature of a mortgage, and therefore consistent with the continued possession of the goods in the vendor or mortgagor.

According to the terms of the assignment, the goods were to have been *delivered* to the assignee, to be sold by him, and accounted for, to the vendor. The value of the goods in question, besides the furniture, &c., in the house, is proved to exceed *double the amount* of the debt due by the vendor to the vendee; the goods were supposed to remain in the store of the vendor five days after the pretended date of the assignment; during which time, the vendor and his clerk, (who never heard of the assignment,) were making hourly sales, as in a common retail store of dry goods; and not a single act of claim or ownership on the part of the vendee was ever heard of, until about one hour and a half after the deputy went to the store, and announced the execution. There is no proof *when* the assignment was in fact made; and there is reasonable ground to believe, that it was in truth made after Stewart heard of the execution, and was ante-dated.

That it was intended as a mere shield of the property, is evident from the fact, that even after the *fi. fa.* was known to Stewart, he permitted the vendee (Hickcox,) to keep possession of the goods, and to convert them to his own use. In fact, the goods have not been sold and applied on the execution, nor have they gone to Stewart; the debtor (Hickcox,) has pledged them in part to raise money, and kept the residue.

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As further evidence of fraud in the assignment, it is to be remarked, that it purports to be a sale, at random and in gross, of all "the goods, chattels, furniture and other personal property in the "store No. 121 Chatham-Street," and also "the goods, chattels "and furniture in the house No. 11 Pearl-Street," without inventory, valuation or description. It was a *secret* assignment ; it was coupled with a trust ; and there is every badge of fraud which existed in *Twine's case*.

V. The deputy sheriff has no excuse for his omission of duty, and appears to have connived at the fraudulent designs of *Stewart* and *Hickcox*, in allowing the goods to be removed without any exertion of authority by him, under the execution, after the plaintiff had conducted him to the store, and pointed out the goods then in the unequivocal possession of *Hickcox*. What could a vigilant creditor do more ? The deputy saw the clerk of *Hickcox* selling part of the goods to customers, while he stood there with the execution in his hands, and did not even forbid it : and this was before any claim was made by *Stewart*.

VI. Finding the goods in the *possession of Hickcox*, (the defendant in the execution,) it was the duty of the sheriff to levy on, and inventory them. If they were claimed by a third person, he might have protected himself by an inquest *de proprietate probandi*, so as to justify a return of *nulla bona*, if the property was found in the claimant.

All this he totally neglected. He took no inventory, made no levy, and took no possession or charge of the goods ; and the second night afterwards, they were secretly removed by *Hickcox*.

In *Bayley v. Bates*, [8 John. 185.] it was decided, that an inquisition finding the property in a stranger, will justify the sheriff in returning *nulla bona*, if there be no collusion. But if adequate indemnity be tendered, the sheriff is still bound to sell the property. Such indemnity was given and accepted, without objection as to time or sufficiency.

It is true, the defendant attempted to prove that the bond of indemnity given by the plaintiff, was insufficient : but the *only* competent witness, *James Mabbett*, (defendant's own witness,) testified, that the surety *Roberts* was at that time a merchant in this city, in good credit.

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This pretence of insufficiency was an after-thought, and a mere subterfuge. The goods were secretly removed, and put out of the reach of the execution, on the night of Monday, the first of January, one thousand eight hundred and twenty-seven : and no inquiry was made, as to the sufficiency of the bond, till Friday the sixth of January, one thousand eight hundred and twenty-seven.

But, if the bond of indemnity were deemed insufficient, the sheriff was bound to speak, or to give notice to the plaintiff or his attorney, both residing in this city.

The truth is, the deputy sheriff determined not to execute the *fi. fa.* on these goods ; and must be presumed to have been indemnified, for adopting that course. But if not so, the plaintiff ought not to suffer for the negligence or folly of that officer.

VII. The testimony of *Westervelt* throughout, was improperly admitted *against* the plaintiff, on the new point of inquiry, on the part of the defendant ; because the witness was clearly interested against the plaintiff, and could not, therefore, be a witness for the defendant.

This testimony, if anywise material, ought to be stricken out of the case, (having been objected to at the time,) excepting only so far as it related to the point of inquiry on the part of the plaintiff ; to wit, the identity of the execution.

VIII. If the court should be of opinion, that *Westervelt* was improperly admitted as a witness for the plaintiff ; yet, inasmuch as it appears that the plaintiff had completely proved his case, as to the identity of the execution, before *Westervelt* was called for that purpose, the plaintiff is entitled to judgment upon the verdict, notwithstanding the supposed error of the Judge in compelling him to answer.

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It being a verdict, subject to the opinion of the court upon the case, the court are to perform the office of the jury, as to every matter of fact, except the amount which is ascertained and fixed by the verdict.

If the plaintiff be mistaken in these positions, there must be a new trial, to enable him to supply the supposed deficiency of proof, arising from the exclusion of Westervelt's testimony, with costs to abide the result.

*Mr. Slosson*, for the defendant, *contra*, contended,

I. That the deputy sheriff was improperly compelled to testify. He considered this a case, where the defendant would be justified in protecting himself by all the rules of law, in their strictest application.

The question is, whether a *party in fact*, can be compelled to testify; for such is Westervelt. He testifies, that he is the real party defendant; that he has given a bond of indemnity to the sheriff, and that he has employed counsel to defend his cause. Were he a party upon the record, he could not be a witness, much less could he be *compelled* to testify. [7 Cow. 174. *Mauran v. Lamb*. 13 East. referred to in 1 Wend. *The People v. Irving*.]

Where a corporation is a party, you cannot compel a corporator to testify, although his name does not appear upon the record. But he is a party in fact, and no person who is the actual defendant, can be compelled to testify against his wishes or his interest. [*Frear v. Evertson*, 20 Johns. R. 142.] A defendant may call a plaintiff as a witness, if he will run the hazard of his testimony, and if he be willing to be examined. But he cannot be compelled to testify against his will. If he could be thus compelled, then the rule ought to be reciprocal. If he can be called *against* his interest, then he ought to be permitted to volunteer in favour of his interest. This would subvert all the rules of evidence, and let in interested witnesses.

In this case, if the sheriff be liable, then the deputy is answerable over to him, and from the records of this trial, facts may be brought forward, sufficient to convict the deputy in the action of

the sheriff against him. Every thing which he swears to is conclusive against him, but those facts material to his defence are excluded. Here the identity of the execution was not proved, and could not be proved, but by the evidence of Westervelt. I waive the point of the variance between the judgment and the *fi. fa.*, at this time, because it is sufficient for this cause, to exclude the evidence of Westervelt. The witness, Stewart, does not identify the execution, and there is no evidence, therefore, to support the declaration. Upon this point, we are confident, the plaintiff must fail.

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[**HOFFMAN, J.** At the trial, it struck my mind forcibly, that the deputy sheriff ought not to be permitted to shield *his* principal, by refusing to testify, and this from reasons of public policy.

*Slosson.* The plaintiff himself, however, objects to the witness the instant he makes one step beyond the line to which he wishes him to advance; he is a competent witness, it seems, to prove the identity of the execution, but he is incompetent to show the insolvency of the obligors of the bond! The plaintiff's own objection proves the correctness of the position we assume by the sanction of the law.]

II. We contend, in the second place, that the deputy was excused, under the circumstances of this case, from making the levy. Roberts claimed to be the assignee of the judgment, and the real party in interest. He went with the deputy when the levy was to be made, and the latter then told him expressly, that if the goods were claimed by another person than the apparent owner, he should require a bond of indemnity, to protect him against the consequences of the levy. The fact that an assignment of the property had actually been made, was communicated as soon as they entered the store, and yet no bond of indemnity was offered. Roberts, it is true, had previously promised to furnish a bond, if one should be required; but, in point of fact, it was not forthcoming until the sixth of January, and before that time, Hickcox, without the knowledge of the deputy, conveyed the goods beyond his knowledge and reach. The pretext of

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collusion is wholly unfounded; for the deputy could have no object in preventing a successful levy. He is an officer responsible in himself, and under bonds for his official good conduct. There is no ground, therefore, for the charge made, or for any imputation against the officer's fairness.

The sheriff was not bound to become a trespasser. He acts in the character of an agent, and like other agents, is bound to exercise all reasonable care and diligence. But if he discharge his duty, then, like other agents, he is protected. [*Bayley v. Bates*, 8 J. R. 185. *Townsend v. Phillips*, 10th Ib. 98.] An inquisition, it is true, shows good faith on the part of the sheriff, but he is not bound to exercise any thing more than ordinary diligence. [*Van Cleeef and others v. Fleet*, 15 J. R. 147.] In this case, the inquisition found that the property was not in the debtor, but the court held, that if the plaintiff would indemnify the sheriff, he was, in such case, bound to make the levy. The principle is, that the sheriff is not bound to incur a risk. He would not be bound to sell without an indemnity, then why should he seize, and thus become a trespasser?

In the principal case, there was no inquisition, neither was there an indemnity proffered or furnished in time, and the sheriff, therefore, was not bound to levy.

Suppose the sheriff had taken the goods, would he not have been liable as a trespasser? The cases answer that question in the affirmative. [2 *Dun. Prac.* 792-3. 4 *T. R.* 633. 6 *Cov. R.* 467. (in a note.)] Where it is agreed, that the giving of the indemnity shall be suspended, that is tantamount to a release of all claim upon the sheriff, until the indemnity is furnished.

But here, when the indemnity was offered, the goods were withdrawn, and so no levy could be made. The indemnity itself was insufficient, as the principal was insolvent, and the credit of the surety was doubtful. The giving of the indemnity was in itself a mere after-thought, and it imposed no duty upon the sheriff whatever. If the plaintiff intended, in truth and fairness, to indemnify the sheriff, he should have prepared his bond at a time when it might have been available, and when the sheriff had the power of making the levy. But, as the matter stood, the sheriff



had nothing to protect him from the consequences of a levy, if the assignee of the goods established his title to them, and he was not bound to incur any peril whatever of the kind sought to be imposed upon him by the plaintiff.

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III. But the assignment to Stewart vested in him the legal title to the goods, and the levy, if made, would have been void. The assignment is perfectly good upon its face, and has for its object to secure to the assignee the payment of his debt, which is proved to be *bona fide*, and also, to secure to the other creditors of Hickcox the payment of their debts, so far as the property would go. Stewart accepted the trust, and by this means, he made himself liable to the creditors of Hickcox, to the extent of the entire value of the goods, provided he could not prove his own debt, and he was, at all events, bound to account. This being so, the title to the property was vested in Stewart, and as the sheriff saw the assignment, it was sufficient to put him on his guard. He could not decide upon its validity, and was not bound to hazard a legal contest as to the interests of conflicting claimants. The possession of the goods by Hickcox, was not *per se* fraudulent, and there is nothing but possession to raise even a suspicion of fraud. [*Bissell v. Hopkins*, 3 Cow. 166, and the note.]

*Per Curiam.* To decide this case, it is not necessary to determine the question, whether the deputy sheriff was a competent witness or not; although that question has been raised and discussed at the bar. It was the duty of the sheriff to make the levy without any indemnity whatever, as he found the goods in the hands of the defendant in the execution; and he would not have been liable to an action as a trespasser, if he had made such levy. The goods were pointed out to him as the goods of the defendant in the execution; he was exercising acts of ownership over them; they were in his exclusive custody and possession; and the sheriff would have incurred no peril from the act of levying. If, after the officer's first duty was performed, a claim to the property had been interposed, then a jury should have been called to determine the right of property. If, by the inquisition,

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it should be determined that the property was in the claimant, then the return upon the execution should be *nulla bona*; and such a finding, although it would not be conclusive upon the question of property, would nevertheless justify such a return. Should the jury declare the property to be in a third person, then the sheriff could not be compelled to proceed further, without a full indemnity. But, in the first instance, he was bound to make a levy, and there is nothing in this case to excuse his neglect in that particular.

The sheriff need never be in difficulty upon this point: for if the title appear doubtful, or the proceedings hazardous, the court, upon application, would extend the time for the making of his return; or he might file a bill of interpleader, and stay all proceedings against him, until the right of property was settled. Indeed, the conflicting claimants could be *compelled* to litigate their claims; and a sheriff, taking the proper course, would never be subjected to damage of any kind.

In this case, the sheriff refused, or, at all events, neglected, to make the levy; and if the plaintiff can show that the goods found in the possession of the defendant in the execution, were in truth his property, he is entitled to recover. To determine this question, we have merely to examine the assignment to Stewart; for if the property in the goods did not pass to him, then it remained, beyond all doubt, in the defendant in the execution; for nobody but Stewart has interposed a claim to it. It is evident, from the testimony adduced, that the assignment to Stewart was fraudulent. It bears about it those characteristics which generally indicate fraud. In the first place, the goods were left in the hands, and under the exclusive controul, of the assignor. This is always such evidence of property in the possessor, that it throws upon the assignee the duty of explaining satisfactorily, why the goods assigned were left in the hands of the assignor: why delivery, which is in most cases essential to pass the title of chattels, did not accompany the act of transfer. It is true, there may be cases where mortgaged property may be left, for good and sufficient reasons to be shown to the court, in the hands of the mortgagor. But the *intent* of the transfer ought to appear upon the

instrument of assignment, and if upon the face of the instrument the transfer is absolute, it will throw upon the claimant the whole burthen of explaining why possession did not follow the transfer.

In the present case, the claimant and the sheriff have not even attempted to show why the goods were left in the hands of Hickcox; why he controuled them; why he sold the goods, and received the money for their proceeds. Here is enough to show the real nature of the assignment, and its objects may be easily guessed, when we look at the date of the instrument, and compare it with the time when the judgment was docketed. The latter precedes the former by several days, and the inference is irresistible, that the object of the assignment was to defeat the execution. The court, in this matter, act also in the place of a jury, and upon every principle of law, as well as inference from facts, we are all of opinion, that the assignment is fraudulent, and therefore void. It is proved, then, that the property remained in Hickcox: it was in his hands on the day when the sheriff's deputy proceeded to his store; it was pointed out to the deputy as the property of Hickcox, and he was desired to levy upon it. It was a plain case, and the sheriff's duty was obvious: it could not be mistaken. But he neglected that duty, and must respond to the complainant for the consequences of that neglect.

There is one more question to be disposed of, in order to meet all the objections to a recovery, and that relates to the execution itself. We consider that the endorsement made by the sheriff is conclusive evidence, that the execution was in his hands at the time the deputy went to the store to make the levy, and this by the operation of the statute. It is his duty to endorse upon the execution the time when it was received, and here the defendant cannot deny, what he has admitted to be true. There could be no difficulty, therefore, in identifying the execution, without a recourse to the testimony of Westervelt; and we therefore disregard that evidence in this part of the case. The sheriff, or his deputy, (and it matters not which, as the sheriff is responsible for the official acts of his deputy,) had this execution on the 29th of December, 1826, and assumed to act under it. He cannot, there-

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fore, gainsay the proof furnished by his own acts, but is conclusively bound by it.

There must be judgment for the plaintiff upon the case, for the amount assessed by the jury.

Mr. Justice HOFFMAN observed, that he was satisfied, upon further reflection, that there was no necessity for calling Westervelt as a witness, and he concurred in the opinion of the court in all its parts.

*Judgment for the plaintiff.*

OLIVER M. LOWNDES, Sheriff, &c.

*versus*

MATTHEW CAMPBELL AND OTHERS.

The parties to a suit in this court, and to another also, in the Supreme Court, for the purpose of bringing the matters in controversy to a speedy decision, and save costs, referred the same to disinterested persons, of their own selection, for a decision, under a stipulation, that if the issue was found in favour of the defendant the said several suits were to be discontinued; but if in favour of the plaintiff, that then a *relicta* for a given sum, should be delivered to the real party in interest, on which a judgment was to be entered up, for the amount, together with costs, to be taxed, including the expense of the reference. Upon a motion by the defendants, to set aside the award of these referees or arbitrators, upon the ground principally, that certain evidence offered by them, at the trial, was rejected, it was HELD that the parties were precluded by the terms of their submission from questioning the award, there being no stipulation for a review.

The award was for less than \$250; but as the action was brought for the penalty of the bond, which exceeded that sum, the plaintiff taxed his costs according to the rules of the Supreme Court. But it was HELD, that as the plaintiff had agreed to accept a *relicta* for less than \$250, waiving a judgment for the penalty, (which otherwise, would govern costs,) he was entitled to Common Pleas costs only.

THE plaintiff in this suit, brought an action of debt on a replevin bond, executed by the defendants; but the real party in interest

was one Abraham Depew. Two of the defendants had previously commenced an action of trespass against Depew, in the Supreme Court, which was also pending. The question in controversy, related to the title to seventy barrels of apples, which had been levied on, by an execution, out of the Marine Court, in favour of Depew, against one Wheeler. The parties, "in order to save costs, and bring the matter to a speedy decision," agreed by a stipulation, signed by their respective attorneys, to refer the question, as to said title, to "three *indifferent* referees," who were named. If the title to the apples, was found by the referees to be in Matthew Campbell and Ira Carpenter, (the plaintiffs in the Supreme Court, and two of the defendants here,) then the suit in this court, and that in the Supreme Court, were to be discontinued, and the parties were to exchange release. If, however, the title was found to be in Wheeler, then the referees were to make a report in favour of the plaintiff, for *one hundred and nineteen dollars and seven cents*; and a relicta for that sum was to be delivered to Depew, on which he was to enter up a judgment for the amount, "together with the taxable costs of this suit, including the costs of the referees."

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To carry this arrangement into effect, a consent and rule of reference were duly filed with the clerk.

At the trial, the plaintiff produced in evidence, a *fi. fa.* for \$119.25, against Wheeler, in favour of Depew, issued out of the Marine Court, on which was endorsed a levy upon the apples. He also produced a bond, for a return of the apples, together with a replevin bond executed by the defendants, on which was endorsed the appraised value of the property levied on.

The defendants, for the purpose of proving the property of the apples, to be in Campbell and Carpenter, called Wheeler as a witness; but he was objected to, on the ground of interest, and rejected by the referees, who made an award in favour of the plaintiff, for \$119.07, finding the title of the apples to be in Wheeler. The attorney for the plaintiff, thereupon, filed the relicta, and entered a rule for judgment thereon *nisi*.

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*Mr. T. C. Pinckney* for the defendants, now moved to set aside the award, and stay proceeding, upon the ground, first, that Wheeler ought to have been permitted to testify. He cited the following cases to this point, viz : [1 *Phil. Ex.* 38 to 57, and the notes. 8 *Johns. R.* 377. 10 *Ib.* 21. 16 *Ib.* 89. 5 *Ib.* 256. 1 *A.* 491. 1 *Caines' R.* 276. 1 *T. R.* 163. 1 *Cox's R.* 332. 14 *J. R.* 362, 3 *Johns. Cas.* 82. 2 *Caines' R.* 77. 11 *J. R.* 185. 1 *East.* 20. 1 *J. R.* 159. 16 *J. R.* 89. 7 *T. R.* 476. *Ib.* 477. n. *Coven's Treatise*, 595. 4 *Mass. R.* 156. 12 *Ib.* 20. 1 *Caines' R.* 167. *Peake's Ex.* 224. 2 *J. R.* 399.]

II. That the plaintiff's attorney had no right to proceed on the relicta, no report having been filed, or served on the parties.

*Mr. Western*, contra, for the plaintiff contended.

I. That the witness was properly rejected, because, by the terms of the submission, he stood in the situation of a party, and the report could be given in evidence, for, or against him. At all events, he had an interest in the event of the suit,—he stood before the referees as a vendor, and could not be permitted to support his own title.

II. All matters, both of law and fact, were submitted to the referees, and the relicta was conclusive upon the defendants. The reference was not made under the statute, but was in the nature of an arbitration, and the relicta covers a release of errors, and the court will not interfere.

*Per Curiam.* The parties in this cause, it appears, submitted the matters in controversy between them, to a tribunal of reference, made by themselves, without any stipulation for a review. They are, therefore, concluded by the award, unless the defendants can show, that the referees have been guilty of fraud. It is said, however, that the referees improperly excluded the evidence of a witness offered by the defendants. If this be so, it

was a mere error in judgment; and this court cannot interfere to correct it. The submission or reference was in the nature of an arbitration, and the relicta having been delivered to the plaintiff's attorney, according to the terms of the submission, he had a perfect right to file it, and enter up judgment. There was no necessity for filing a report, for the relicta stood in the place of it by the consent of the parties, and being signed by the attorney of the defendants, it was conclusive. This motion, therefore, is denied, with costs.

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It afterwards appeared, that the plaintiff's attorney had taxed the costs according to the rules of the Supreme Court, and *Mr. Western* moved for costs as taxed. He insisted that the plaintiff was entitled to such costs, as the action was upon the replevin bond, which was for a sum exceeding \$250. The judgment in such cases, is for the *penalty* and carries *full costs*. [*Harvey v. Walker and Bardwell*, 6 Cowen, R. 57.]

*Mr. Pinckney*, contra, contended,

That the plaintiff was entitled to Common Pleas costs only, he having accepted a cognovit for a sum less than \$250. [*He cited* 2 *Dun. Prac.* 734. 1 *R. L.* of 1813. p. 347. *Sec.* 21. 1 *Caines' R.* 66.]

*Per Curiam.* If this were a case arising under the action for the *penalty* of the arbitration bond, then if the plaintiff succeeded, he would be entitled to costs, according to the amount of the penalty, because the judgment would be for the penalty. But here the plaintiff agreed expressly to except a part of the penalty, in full satisfaction of his claim, and has stipulated that his recovery should be for a sum less than two hundred and fifty dollars. He is entitled, therefore, to Common Pleas costs only.

[*H. M. Western, Att'y for the plffs.* T. C. Pinckney, *Att'y for the defts.*]

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HENRY SEWALL

versus

WILLIAM L. B. GIBBS AND WILLIAM P. JENNY.

Usage of trade cannot be set up, either to contravene an established rule of law, or to vary the terms of an express contract. But all contracts, made in the ordinary course of business, without particular stipulations, expressed or implied, are presumed to be made in reference to any existing usage or custom, relating to such trade; and it is always competent for a party to resort to such usage, to ascertain and fix the terms of the contract.

The defendants, purchased of the plaintiff, a ceroon of indigo, at public auction. Notice was given, at the time of sale, that the indigo would be sold subject to the usual tare of 10 per cent. The tare, in point of fact, amounted to upwards of 17 per cent. At the trial, the defendants were permitted to prove, that the indigo had been fraudulently packed, and that, in all cases of fraudulent packing, it is the custom of the trade, to allow the purchaser the actual tare. *Held*, that this evidence was rightly admitted. *Held* also, that the defence was properly set up, under the general issue, and that the defendants could claim a deduction of the actual tare, without offering to return the indigo.

The defendants, sometime after the purchase, paid into court a sum sufficient to cover the amount of the indigo after deducting the actual tare. *Held* that, as the sale in this case was for cash, the plaintiff was also entitled to interest, from the day of sale to the day of payment, and, therefore, that the amount paid into court, was not sufficient to cover the plaintiff's demand.

This was an action of *assumpsit*, for goods sold and delivered. The plaintiff sought to recover for a ceroon of indigo, which was described in his bill of particulars, as weighing 114lbs. subject to a deduction of ten per cent. for tare. The defendants pleaded the general issue, and a tender of \$182, on the 22d day of May, 1828. The plaintiff replied, denying the tender.

At the trial, the plaintiff proved, that a number of ceroons of indigo had been sold for him, at public auction, on the 19th day of February, 1828; and among them the ceroon in question, to the defendants. A clerk of the auctioneer, was called, as a witness for the plaintiff, who testified, that it was expressly declared, at the time of sale, that the indigo would be sold subject to the usual deduction of ten per cent. for tare. That the ceroon purchased



by the defendants weighed 114lbs. gross, and was struck off at fifteen shillings and a penny per lb. That it was not customary to deduct any fractions of a lb. for tare, and that the indigo, thus sold, consequently, came to \$194.30.

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Upon this evidence, the plaintiff rested his cause.

The same witness, being cross-examined by the defendants, stated, that the indigo in question was advertised, as the first quality of Caraccas indigo; that ten per cent. is the usual tare allowed on the sale of indigo, and that this was sold expressly at the usual tare. That the actual tare, generally corresponds very nearly, with the customary tare; but that, in this case, it exceeded the usual rate, and complaints were made by purchasers that it was excessive.

The defendants then called a number of witnesses, who testified, that it is the custom, in selling indigo, to allow ten per cent. for tare; and, where the actual tare varies from this, two or three pounds more or less, the difference is not regarded. That, in ordinary cases, the actual tare corresponds very nearly with that allowed by custom: but where the excess, beyond ten per cent., is so great as to create a presumption, that there has been fraud in the packing, then it is the custom, to allow the whole actual tare to the purchaser. In this case, the tare was about 17lbs.: one of the witnesses stated it at 17lbs. and another at 17lbs. 12oz.

Some of the witnesses testified, that the indigo in question was, in their opinion, fraudulently packed in Caraccas; but there was no pretence, that the plaintiff was accessory to it, or that he was in any way chargeable with fraud. It appeared also, that it is usual, in packing indigo, to use two or three pieces of hide at the end, and along the seams of the package; but that in this case, 53 pieces of hide were found; and some of the witnesses thought, that the extra pieces were put in fraudulently, to increase the weight of the ceroon.

Upon the question of fraud and usage, the testimony was somewhat contradictory, and several dealers in indigo were called by the plaintiff, who stated, that they knew nothing of any custom, to allow the actual tare, in cases of fraudulent packing. Some of the witnesses stated, that in packing indigo at Caraccas

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the intention was, to put 100lbs. net into the linen wrapper ; and that, as the indigo is always sold subject to tare, about ten per cent. was added to the net weight, by packing in skins. It also appeared, that the indigo in question was charged to the defendant, in the invoice, at 100 lbs. net, and that the tare on this particular ceroon, did not exceed the average of that upon the other ceroon sold at the same time. The defendants offered no evidence to support their plea of tender, but proved that they paid into court, under the rule for that purpose, \$183.50, on the 22d day of May, 1828.

The Judge charged the jury, that, if they believed that the net weight of the indigo was 97 lbs. instead of 96 lbs. and 4 oz., and if the defendants had not paid into court the amount due for the 97 lbs., together with interest, then the plaintiff was entitled to the amount due for the 97 lbs. That, at all events, the plaintiff was entitled to the amount, which the defendants admitted to be due, by their plea of tender, together with interest on that sum up to the time of paying the money into court ; and the jury were desired by the Judge, in giving their verdict, to express their opinion upon the questions of fraud and usage.

The jury returned a verdict for \$183.50, in favour of the plaintiff. They also found, that fraud had been practised in packing the indigo at Caraccas, and that it is the usage, in cases of fraudulent packing, to allow the actual tare to the purchaser.

Mr. Robert Sedgwick, for the plaintiff, now moved for a new trial, and contended,

I. That the evidence of usage ought not to have been admitted at the trial. It appears, from the testimony, that the indigo in question was sold at auction, at the usual tare of *ten per cent.* ; it was offered by the plaintiff, subject to that express deduction, and no other. The defendants, however, were permitted to show, that there is a usage among dealers, to allow a larger deduction for tare, in certain cases. This evidence is inadmissible, because it tends to contradict the express contract between the par-

ties. Proof of usage is admitted, for the purpose of giving a construction to a contract, in cases where it would not otherwise be intelligible; but if the agreement be explicit and clear, it cannot be controlled by proof of a custom which serves to vary or contradict it. Mercantile contracts are not subject to any peculiar rules of construction, but are construed, like all other contracts, by the terms used. If their meaning be doubtful, or if it cannot be ascertained without resorting to proof of extraneous circumstances, not apparent from the agreement itself, then a usage may be proved for the purpose of explaining the contract. In this case, the plaintiff's terms of sale were clear and explicit. The indigo was sold under the inspection of the buyer, without fraud and without warranty, and subject to no condition except the deduction of ten per cent. for tare. Usage was not necessary to explain this contract, and the evidence upon this point was improperly admitted. [*Hibbert v. Shee*, 1 Camp. 113. *Thompson v. Ashton*, 14 J. R. 316.]

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II. There was no warranty in this case, either express or implied, that the commodity sold, should be what it purported to be. It was not a sale either by sample or description; if it had been, then the bulk must have answered the description in the one case, and corresponded with the sample in the other. But here, the seller placed the article to be sold before the buyer, for his personal inspection, without fraud or warranty, and the rule *caveat emptor* applies. The buyer purchased the indigo upon his own judgment, by his own skill, and the quality and condition of the article were as well known to him as they were to the seller. If the former had desired any security beyond that afforded by his own knowledge, he might have asked for a warranty, and then the latter would have had an opportunity to disclaim all personal responsibility as to the quality of the indigo. But as the express warranty was neither asked nor given, the law will not imply one, and the purchaser takes the article at his own risk. [1 J. R. 129. *Doug.* 665. *Gardner v. Gray*, 4 Camp. p. 144. *Sands & Crump v. Taylor & Lovett*, 5 Johns. R. 396. *Smith v. Colgate*, 20 Johns. R. 204. *Oncida Man. Soc. v. Lawrence*, 4 Cowen, 444.]

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III. As the defence in this case rests entirely upon an implied warranty, it cannot be sustained without an offer to return the goods. Where the buyer elects to keep the articles purchased, without making any offer of return, he must pay for them, at all events, and rely upon his warranty. In cases of express warranty, there should always be an offer of return, otherwise evidence cannot be admitted to prove a defect in the goods, or deterioration in their value, for the purpose of reducing the plaintiff's demand. Where the action is upon a *quantum meruit*, the rule is different. [*Paine v. Whale*, 7 East. 274. *Thornton v. Wynn*, 12 Wheat. 192. *Sill v. Rood*, 15 Johns. R. 230. *Basten v. Butler*, 7 East. 479.]

The defendants should, at all events, have given notice, with their plea, as to the nature of their defence. It was their duty to have given notice, in the first instance, of the cause of complaint when discovered, so that the plaintiff might resort back to his vendor; and he ought also to have apprised us of the defence about to be set up, in order that we might not be taken by surprise. The defendants have neglected their duty in all these particulars, and this defence, therefore, cannot now be sustained. [*Rumyons v. Nichols*, 11 Johns. R. 547.]

IV. The plaintiff was entitled to a greater amount than that paid into court. The verdict was for the exact sum paid in: but the plaintiff is entitled to interest on that amount from the time of the sale to the day of payment; for in sales for cash, interest follows a delay of payment, as matter of law, and all sales are presumed to be for cash until the contrary is shown. We are entitled, at all events, to interest on the sum stated in the plea of tender; for the plea of tender is an admission of a debt due to that amount. [*Spalding v. Vandercook*, 2 Wend. R. 432.]

V. The verdict was against evidence, as there was not sufficient testimony to prove a fraudulent packing of the indigo at Caraccas.

[Upon this point, the counsel on both sides discussed the question at large, and examined the testimony with care; but as the argument relates to a mere question of fact, it is omitted.]

*Mr. John Anthon, for the defendants.*

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The defence in this case, had reference solely to the quantity of the indigo purchased by the defendants, and the quality of the commodity was not a subject of controversy. The question related to the amount of *tare* to be deducted from the gross weight; and to ascertain that, the defendants introduced proof of a usage established among merchants, in the sale of indigo, to allow full *tare* in all cases where it has been improperly increased by fraudulent packing. The question now is, whether that evidence was properly admitted.

I. We admit that usage cannot be introduced for the purpose of contradicting or controlling an express contract; neither was the evidence offered with any such intention. The plaintiff himself showed, that the article in question was sold subject to the "*usual tare*," and we introduced evidence to explain what is meant by *those terms*, in the sale of indigo. The plaintiff proved a part of the usage, and we claimed the right to prove the whole, for the purpose of showing what our liability to the plaintiff actually was. Our inquiry related solely to the wrapper in which the indigo was contained; and we proved, conclusively, that it is the custom of merchants to allow full *tare*, in all cases where the weight of the wrapper has been improperly increased by fraudulent packing.

What objection can there be to the introduction of this proof for such a purpose? In what way can the amount to be paid by the defendants be ascertained, except by the very evidence, which we brought forward? The gross weight of the ceroon was 114 lbs.; but the plaintiff does not pretend that we are to pay for that number of pounds: he admits that it is the custom to deduct ten per cent. for *tare*. We say, that the custom which he admits, applies only to ordinary cases, where the packing has been honest: but in cases of fraudulent packing, like the present, the custom is, to allow to the purchaser a deduction of the actual *tare* from the gross weight. In point of fact, the jury have found that

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we are correct, as to the custom, and they have also found that the indigo was fraudulently packed at Caraccas.

The proof of usage, then, was correctly admitted; for without it, the actual agreement between the parties could not have been ascertained. That it was a part of the contract to deduct *ten per cent.* for tare in ordinary cases, is admitted; and we prove, that it is also a part of the contract to deduct the *whole tare* in cases of fraud. The sale, then, was by agreement of parties made subject to the usage, and in such cases, the rule is well settled that the custom may be proved. This evidence in no way contradicts the contract; it merely explains and ascertains what it really was; and so far from contravening the rules of law, it upholds the principles which are fixed and settled by decided cases. [4 *Camp.* 144. 1 *Holt.* 95. 1 *Car. and Pay.* 59. *Id.* 392. 4 *Stark. Ev.* 449.]

The cases cited by the counsel for the plaintiff, relate entirely to the *quality* of the article sold: but the sole question here is, as to the *quantity*; and in the absence of an express contract to the contrary, the parties, by force of the custom, agreed to deduct the full tare.

II. As to a return, or an offer to return goods purchased, the doctrine upon this subject applies solely to cases of sale with warranty. Even in such cases, there are qualifications to the rule; but it is not necessary to examine them, because they are not applicable to the present subject. [6 *T. R.* 320, *Cutter v. Powell.*]

We were not bound to give notice in this case, because it is not customary to return the goods; on the contrary, they are to be retained by the purchaser, (except in cases of warranty, which the plaintiff asserts did not exist here,) and the tare is to be deducted from the gross weight. As the question relates solely to the *quantity* of the article purchased, the defence is properly set up under the general issue, and the plaintiff is bound to prove his claim, as in ordinary cases.

IV. The only real question in this cause, is that which relates to interest. The jury, by their verdict, have found that the net

weight of the indigo was 96 lbs. 4 oz. : its value, therefore, at the rate of purchase, was \$181.43. The defendants paid into court \$183.50, and this amount covers principal and interest up to the time of payment.

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But the jury were not bound to allow interest ; that was a matter within their sound discretion, under the special circumstances of the case. The demand was unliquidated, and as there was no agreement that interest should be paid, the jury, in their discretion, might reject it altogether. The money here was not paid under the plea of tender, but was put into court subject to the plaintiff's order, and the jury have allowed him all that he can claim either in law or equity. [4 Cowen R. 496. 6 Ib. 193.]

JONES, C. J. THIS was an action of *assumpsit*, to recover the amount claimed to be due for a ceroon of indigo, sold to the defendants, at 15s. 1d. per pound, subject to deduction from the gross weight for tare. The leading question on the merits, turned upon the amount of tare which was to be allowed and deducted. The plaintiff's claim, after the deduction admitted by him, amounted to about \$194.20, which the principles of the defence would reduce to \$182.94. The defendants pleaded a tender of \$182, but offered no proof of the tender at the trial. They, however, paid into court, under the usual rule for that purpose, the sum of \$183.50, which was probably intended for the amount due on the purchase, after the deduction claimed by the parties. The Judge told the jury, that the plaintiff was, at all events, entitled to the sum which the defendants had admitted by the plea of tender to be due, with interest from the sale. The jury gave a verdict for \$183.50.

By this verdict the principle of the defence was fully sustained, and the jury obviously intended to confirm the allowance of tare claimed by the defendants. I should have been satisfied with the verdict, had the jury, in settling the amount of it, conformed to the spirit of the direction they received from the Judge. But they have allowed the plaintiff the exact sum paid into court by the defendants, without adverting to the circumstance, that it does not include the full interest upon the sum admitted by their plea

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of tender, to be due from the time of the sale and delivery of the indigo, which they were instructed to allow. The direction of the Judge, on this point, was correct, and ought to have been observed.

The sale of the indigo was by auction, and not being shown to be on credit, is to be intended to have been for cash. The purchaser was, consequently, chargeable with interest from the time of the sale and delivery of the article, which ought, of course, to have been allowed against him. The jury were probably led into the error by the miscalculation of the defendants, and acted upon the supposition and belief, that the full amount of interest was included in the sum paid in by them. But it is nevertheless, an error, which, unless cured by the consent of the parties to rectify it, will compel us to set the verdict aside. A new trial, however, with our impressions against the plaintiff on the other questions in the cause, would not probably avail him.

And first, the usage to which the plaintiff objects, was, we think, clearly admissible. The sole object of it was, to enable the defendants to ascertain and show the quantity of indigo for which they were to pay the plaintiff. The article of indigo in ceroon, is necessarily subject, on purchases and sales by the pound, to deduction from the gross weight of the wrapper or ceroon for tare: the purchaser is, however, to pay the price of the indigo for the ceroon or wrapper in which it is packed. Now the average tare for the ceroon or wrapper in ordinary cases, when honestly and fairly packed, has been found to be ten per cent. ; hence, casual and unpremeditated variances being disregarded, that average rate has, for the mutual convenience of dealing, been established by custom, as the rate of tare, to be allowed in all ordinary cases on sales, in the common course of business. Experience was the teacher whose counsels introduced the rule, and when it was seen that fraud would sometimes derange its accustomed operation, and cause it to work injustice, the same unerring guide led to the modification of the general usage, by a particular custom adapted to this emergency ; and it became by common consent, as part of the custom of the trade, that in cases of excess of tare by the fraudulent packing of the ceroon, the whole actual tare should be deducted from the gross



weight and allowed to the purchaser. The whole entire custom of the trade, then, is to allow the average tare of ten per cent. on all purchases, as a matter of course, but in the special case of an undue excess by fraud in packing, to allow the whole actual tare to the purchaser. Cases of dishonesty in packing, by which the quantity of indigo is intentionally diminished by the fraudulent excess of tare, are out of the reason of the general custom, and come properly within the principle of the particular custom, thus incorporated into the general usage of the trade.

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The case now before us was proved by the testimony on the trial, and found by the jury, to be one of that class of infected cases, and the special usage, which we hold to govern it, was also established by proof and found by the verdict. On turning to the case, we find, that the tare of this ceroon was proved to be about 17 per cent., being an excess of 7 per cent. above the average rate; and that the jury, upon the question being specially put to them, declared that fraud had been practised in packing the indigo at Caraccas. It cannot, I think, be denied, that this excess of tare, and the presence of the extra pieces of useless hide proved to have been found in the ceroon, were sufficient presumptive evidence of fraud; and if so, it was a case of fraudulent packing, in which the custom is, to allow the whole actual tare to the purchaser. The question of the sufficiency of the proof of this custom, was also specially put to the jury, and they have, by their answer, distinctly affirmed its existence. On both these questions, thus specially propounded to the jury, their finding is supported by the testimony, and ought not to be disturbed.

The fraud in the packing of the indigo, and the usage consequent upon it, must, therefore, be taken as established facts in the case. But the point of the objection is, that the custom, admitting it to subsist, was not admissible in evidence on this issue, and the plaintiff contends in support of the objection, that by the express terms of sale, the rate of tare was to be ten per cent., and no further deduction to be allowed. But is that the contract between the parties? The witness who proved the sale, testified, that it was expressly declared at the time, that the indigo would be sold subject to the usual deduction of ten per

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cent. for tare ; and on his cross-examination, he says that ten per cent. is the usual tare allowed on indigo, and that this ceroon was sold expressly at the usual tare. What is there in the terms of sale, as proved by this witness, to effect the right of these defendants to the benefit of the usage in question ? It was a sale in the usual and ordinary course of business, and the declaration that the indigo would be sold subject to the usual deduction of ten per cent. for tare, which is the strongest expression used by the witness, was no more than the formal announcement to the bidders, of the uniform rate of tare, which was by the general custom established for ordinary cases, and would be applicable, in the first instance, to all sales of indigo in ceroon, by weight. It left untouched the special usage, applicable to cases of excess of tare by fraud in packing the indigo. No immediate or prospective provision was made to regulate the application of the usage, in the event of the case occurring, or to modify or impair the purchasers' claim to its full benefit.

It was not known or supposed, at the time of sale, that any fraud or deception had been practised in packing the indigo at Caraccas, or that the tare would be found so excessive as to induce the presumption of fraud ; and the developement could not take place, nor the true character of the transaction be ascertained, until the ceroon was opened, when the fraud must necessarily be exposed. At the sale, therefore, this ceroon would be sold on the same terms as the rest, and the purchaser would conform to the general rule for the allowance of tare, until the secret fraud which distinguished it from ordinary cases, and brought it within the special usage, was discovered : but upon that discovery showing an excess of tare by dishonesty in packing the indigo, the special usage took effect and applied ; entitling the defendants, as the purchasers, to the allowance and deduction of the full actual tare, instead of the average rate of ten per cent. Every such purchase and sale, in the usual course of business must be held to be made in reference to this usage, and if the facts and circumstances when disclosed, call for its application, it is to govern the case.

The vendor, if not himself a party to the fraud, may by contract, guard himself against the consequences of the usage ; but

the agreement which protects him, must, I apprehend, in substance, provide that the risk of excess of tare by fraud, shall devolve upon the purchaser, and be borne by him, and the whole gross weight after the customary deduction of 10 per cent. be paid for, notwithstanding any such secret and fraudulent excess of tare. There is certainly no such provision in this contract, nor can the terms of this sale, by any construction, be made to indicate any such condition or agreement. It was the sale of the indigo by weight, at a given price per pound, and not by the ceroon for a gross sum. And its language refers to the state of things as then supposed to exist. No express provision was made for the case of a fraudulent excess of tare, and, as respected that contingency, the parties necessarily contracted in reference to the usage, which was to regulate their rights, in case of its occurrence.

The effect of the contract of sale, as I understand it, was, that the ordinary deduction of 10 per cent., which applied to all sales of indigo in ceroon by weight, should, as a matter of course, and at all events, be made, and that the excess beyond that rate, if any excess should be discovered, and should be found the clear result of fraud in packing the indigo, should also be deducted from the gross weight, so as to allow the purchasers the whole actual tare, according to the usage applicable to the case. The custom then, was not in conflict with the contract or the terms of sale, and could not be excluded on that ground. Was it liable to any other exception? It is too just in its principles, and too fair and reasonable in its application, to be exposed to the charge of being at variance with any rule of law or morality. And the circumstance that the dealers in indigo, have by common consent, established it for their government in special cases of fraudulent excess of tare, bespeaks it a beneficial, just and salutary qualification of the general custom. If, therefore, the defendants were advised that it was material to their defence, they had a right to introduce it in evidence at the trial. A glance at the pretensions of the parties will satisfy us of the importance of its bearings on the merits.

The indigo being purchased by weight, and subject to tare, a just allowance was to be made for the tare before the quantity to

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be paid for could be ascertained; and the question chiefly in controversy, was the allowance to which the defendants were entitled on that account. The tare in this, as in other cases, if no customary rate had been established, must have been ascertained by the process of weighing, and the actual tare thus ascertained, would, in such case, be the deduction to be made for the gross weight. But that process was too inconvenient for practice, and ten per cent. being found, by experience, to be the average tare in ordinary cases, was established by common consent, as the rate to be allowed on purchases and sales.

The plaintiff claimed the application of this customary rate to the sale in question. But the claim was repelled by the defendants, on the ground that the case was not within the principle of the usage which applied to ordinary purchases and sales, but that the dishonesty in packing the indigo in this ceroon, had produced a fraudulent excess of tare, and that in such cases the custom was to allow the purchasers the whole actual tare, instead of the average rate of ten per cent.; and the offer to which the plaintiff objected, was to prove that special custom in support of the defence. Now the point in dispute, was the tare to be allowed the purchaser. And considering that question as controlled or materially influenced by the established usages of the trade, it becomes important to show what those usages were.

The plaintiff having, at the sale, referred to the customary rate of ten per cent., and, on the trial, shown that to be the usual allowance for tare on indigo, the defendants were driven to the proof of the whole custom, in explanation of the plaintiff's evidence, and to show, that the usage admitted and referred to by him, applied to ordinary cases only where the indigo was honestly packed; but that in cases of fraud and deception, producing an unfair excess of tare, and a corresponding deduction of the quantity of indigo, the custom was to allow the whole of the actual tare to the purchasers, as a deduction from the gross weight. The usage on which the defendants relied in their defence, composed a branch or part of the custom, which the plaintiff had himself shown. It was the practice of the general custom, which applied to the purchase and sale in question. And to have held the defendants bound by the general

rule, and yet to have denied them the benefit of the exception engrafted upon it, would have been manifestly unjust. They were surely entitled to prove that their case did not come within the principle of the average rate applicable to ordinary sales, but was governed by the particular usage which applied to special cases of fraudulent excess of tare, by deception and dishonesty in packing. And what testimony could be more appropriate and material to that defence than the usage they offered? It went directly and conclusively to establish the right they claim, and it let in the accessory proof to ascertain and show to the jury the true quantity of indigo actually delivered to them, and for which they were justly chargeable, and ought to pay.

The defence taken on this point by the defendants, was against the plaintiff's claim to apply the general average rate of tare to their purchase. They resisted the claim, because it exacted from them full payment of the contract price for what was never delivered to them, and their purpose was, not to discharge themselves from the obligation to pay for the indigo they received, but to reduce the plaintiff's demand to the standard of justice, by ascertaining and showing the true quantity of the article sold and delivered by the plaintiff, and received by them. To this point their proof was directed. It was full and complete, and upon the supposition, that the custom admitted and shown on the part of the plaintiff, would, if unexplained and without qualification, stand in the way of the defendants' proof of the fact of excess of tare, or render that proof unavailing to them, must it not be competent to them to show that the average rate of tare did not apply to them, but that in such cases of fraudulent excess as they show this to be, the custom is to allow the purchaser the deduction of the whole actual tare, instead of the ten per cent.? The usage and custom of the trade, both in their application to ordinary cases, and to the special case of fraudulent excess of tare, by the dishonest packing of the indigo, as explained by the testimony, appear to me to be perfectly competent, reasonable and just, and they interposed no obstacle to the defendants' defence. And, viewing the proof of the particular usage in all its aspects and bearings, I am satisfied that it was admissible and proper evidence.

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II. It was not necessary for the defendants to make any offer to return the indigo. There was no intention or desire on their part to rescind the contract; and their defence did not turn upon any failure or non-compliance of the plaintiff in respect of any warranty or covenant, express or implied, of the quality of the article. The merits of the defence rested upon grounds disclosed in the case, and which certainly did not require the return, or offer to return, the indigo. That objection, therefore, is wholly inapplicable.

III. But it is further objected, that seasonable notice was not given by the defendants of the claim for the excess of tare, on the ground of fraud in packing the indigo; and that the plaintiff, by reason of the neglect, lost the opportunity of an early application to his vendors for indemnity. Whatever consideration might, under other circumstances, be due to this complaint, it comes before us without any just pretensions to our favour. The sale was on the 19th of February, and on the 22d of May following, money was paid into court by the defendants, on the principle of their defence. It does not appear at what precise time the discovery of the fraud was made, or when notice of the defence was given, but no exception was taken at the trial to the want of sufficiency of notice. And it is too late now to raise the point. If the objection had been made at the trial, full and early notice, if held necessary, might have been shown.

The only valid objection, is the error of the jury in the amount of their verdict; but the extent of that error is ascertainable by mere calculation, and it may, by the consent of the defendants, be amended. If they assent to the amendment, judgment is then to be entered upon it, as amended, for the plaintiff with costs, otherwise a new trial will be granted, or the plaintiff may enter judgment on the verdict, as it stands, with costs, at his election.

OAKLEY, J. (after stating the facts.) There is no ground for the objection, now made by the plaintiff, that the verdict is against evidence, as the weight of the proof seems to me to be decidedly in favour of the defendants.

It is well settled, that a usage of trade cannot be set up, either to contravene an established rule of law, or to vary the terms

of an express contract. (*Thompson v. Ashton*, 14 J. R. 316. *Teats v. Pirn*, 1 Holt, 95.) But it is equally well settled, that all contracts made in the ordinary course of business, without particular stipulations, expressed or implied, are presumed to be made in reference to any existing usage or custom, relating to such trade; and that it is always competent for a party to resort to such usage, not to vary, but to ascertain and fix the terms of the contract. In the case now before us, the indigo was sold at the usual rate of tare; and that rate, appears to be admitted, to be 10 per cent. If the terms of the sale had been, that no more than 10 per cent for tare, should be deducted, the purchasers would be bound by the express stipulation of the contract, in the absence of fraud on the part of the seller. I do not understand the notice given by the auctioneer, at the time of the sale, as amounting to such an express stipulation. The purchasers at the sale must have understood, when the rate of tare was announced to be 10 per cent., that reference was had to the supposed fact, that the ceroons of indigo were honestly packed; for, in such cases only, is ten per cent. the usual tare. The usage to allow actual tare, in cases of fraudulent packing is to be taken to be well understood, and the parties are to be considered as contracting in reference to it.

In the absence of any usage on the subject, the actual tare would be allowed, as the purchaser would be obliged to pay only for the real quantity of the article received. If, then, a rule is introduced by custom, to estimate the tare at 10 per cent., without regard to the actual tare, I see no reason why that rule may not be modified, by custom, so as to confine its application to cases in which there is no fraud. The one usage, or custom, rests on the same foundation with the other. I am of opinion, therefore, that the evidence objected to was properly admitted. It was resorted to simply to ascertain the real quantity of the article sold.

It is contended, however, that there should have been an offer to return the indigo by the defendants. This can never be necessary, unless the contract is intended to be rescinded. The contract was a valid and fair one. It was a sale of a quantity of

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indigo, the actual amount of which was unknown to the parties. To ascertain that amount, resort is had to the known usages of the trade, in estimating the tare to be deducted from the gross weight. The contract is admitted to be binding, and the only inquiry is, what are its terms? This view of the case is also an answer to the objection, that notice of the defence offered should have been given under the general issue. The plaintiff being bound to know the usage of deducting the actual tare, in cases of fraud, that usage was a part of the original contract of sale, and open to inquiry under the plea of *non assumpsit*. It was not matter arising subsequently to the contract, and set up to avoid it.

I think that the jury ought to have allowed interest upon the price of the indigo. It not appearing that any credit was given at the sale, it must be inferred that it was a cash sale; and the defendants should have brought into court, in order to protect themselves from the costs of the suit, a sum sufficient to cover the price of the indigo, with interest from the time of the sale. They did not do this. Estimating the quantity of indigo at the least rate, 96 1-2 lbs., and charging the defendants with the interest, it will appear that the verdict of the jury was too small. It may be amended by the consent of the defendants. If not, a new trial will be granted, or the plaintiff may enter judgment on the present verdict, with costs, at his election.

[D. D. Field, *Att'y for the plff.* William Samuel Johnson, *Att'y for the defts.*]

*Note.*—Upon the subject of paying money into court, and the effect of such payment, there have been many decisions, some of which are not, perhaps, entirely consistent with others. A complete digest of the English cases may be found in *Starkie on Ev.* [Vol. 3, part IV. p. 1094.] and in *Harrison's Index, tit.* "Costs" and "Payment." By paying money into court, the defendant, it seems, admits a cause of action to the amount paid in; and where the declaration is upon a special contract, he also admits the contract; but he does not thereby admit all the averments necessary to sustain the action. As for instance: in an action on a valued policy, where a total loss is averred in the declaration, the defendant, by paying money into court, admits the making of the policy, and perhaps the terms of it, but he does not admit thereby a total loss. This averment must be proved, or, in other words, the plaintiff must show damages beyond the amount paid in. [*Rucker v. Palgrave*, 1 Taunt. 419. 1 Comp. 557.] If the plaintiff does not est-



blish a claim to a larger sum than that paid in, upon the production of the rule, he is liable to be non-suited. [3 T. R. 657. 2 Salk. 597. 4 T. R. 10. 7 T. R. 372. 2 H. B. 374.]

In the case of *Stoveld v. Bruvin and another*, [2 B. & A. 117.] the reporter's note says, that "payment of money into Court generally on the whole declaration, admits the contract as stated in each count, and a breach of it, and that something is due on each count thereon; but it does not admit the amount of the breach there stated."

In the case of the *Bank of Columbia v. Southerland*, [3 Cowen's R. 336.] the court held, that where money is properly paid into court under a suitable rule, the sum paid in, is to be considered "as stricken out of the declaration. It is a defence *pro tanto*, and unless the plaintiff proves a sum beyond what is paid, there should be a verdict for the defendant."

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Although usage may be resorted to, to fix the sense of particular terms, in a policy of insurance, where they have acquired a peculiar meaning, as between insurers and assured, yet, it can never be set up, to affect or vary an express agreement, nor to contradict a rule of law.

Therefore, in an action, upon a policy of insurance, where the claim was for damage sustained by the perils of the sea, and on the arrival of the goods at New-York, they were landed, before the wardens of the port had held a survey upon them, the defendants were not allowed to prove, either as an objection to the preliminary proofs, or in bar of the action, that "by the usage of trade, in the port of New-York, the master of the vessel, is responsible for damages sustained by goods, delivered by him to the owner, or consignee, unless there has been an actual survey, on board the vessel, by the port wardens, by which it shall have been found, that the goods were properly stowed, and were damaged on the voyage by the perils of the sea; and that, by a similar usage as between insurers and assured, the survey so made is a document indispensable to be produced, in order to charge the underwriters, and that the preliminary proof is deemed insufficient, unless such a document is exhibited as a part of it."

A stevedore, employed by the master to stow the cargo, is a competent witness to prove that it was properly stowed.

This was an action upon a policy of insurance, made by the defendant, on account of ———, bearing date the 14th of September, 1825, on merchandise; each package of which, not excepted in the memorandum, was to be subject to its own average, as if separately insured. The goods were to be shipped prior to

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the first of April, 1826, on board of any vessel or vessels from Liverpool, or London, to New-York, and the sum subscribed to the policy was \$30,000.

The cause was tried before the Chief Justice, and at the trial, the plaintiffs produced the same preliminary proofs, which they had previously (and within a proper period) exhibited to the defendants. These consisted,

I. Of a bill of lading, in the ordinary form, of three packages of merchandise, containing skivers, shipped by William and James Brown & Co., at Liverpool, and consigned to John Rankin, at New-York. II. An invoice of those articles.

III. An affidavit made by the first mate of the ship *Corinthian*, in which the goods were imported, setting forth, that the cargo of that vessel, was well and sufficiently stowed at Liverpool, by a competent stevedore, and that, if any damage came to any part of the goods on board, it must have arisen from causes not to be attributed to the ship, or the stowage of her cargo.

IV. A certificate signed by George G. Coffin, master warden of the port of New-York, and the clerk of the board of wardens of that port, setting forth that two of the wardens, at the request of Mr John Rankin, "*had been in store* and taken a strict and careful "survey" of three cases of merchandise, imported in the *Corinthian*, and damaged *by being wet with sea-water*, on the voyage of importation. The certificate then set forth, that the goods had been sold at public vendue, under the inspection of one of the wardens of the port, for the sum of four hundred and forty dollars.

V. A protest made on the 7th of February, 1826, by a notary in New-York, upon the testimony of the master, mate and steward of the *Corinthian*, setting forth the departure of that vessel from Liverpool, with her cargo on board, on the 30th of November, 1825; that she encountered much bad weather on her voyage, shipped many seas, and was much strained.

VI. An appraisement of the articles, shewing that they would have been worth, in a sound state, nine hundred and sixty dollars.

VII. A statement of the claim for loss, exhibited to the defendants on the 4th of February, 1826, by John Rankin. VIII. An account of the sales of the damaged articles. IX. Proof of interest in the plaintiffs. X. The policy as herein before set forth.

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When these preliminary proofs, were originally presented to the defendants, they refused to pay the loss, upon the ground that they were defective: and their counsel at the trial objected to their sufficiency, first, because there was no evidence to show that the goods *had not been injured previously* to their being laden. Secondly, because there was no proof to show that the goods had been properly stowed; and thirdly, because there was no evidence to show, that the goods had been examined and surveyed on board of the vessel after her arrival at New-York, and before their delivery to the consignee.


In support of the last objection, the counsel for the defendants offered to prove, "that by the established usage of trade in the port of New-York, and in other ports, the master of the vessel is, in all cases, responsible for any damage sustained by the goods delivered by him to the owner or consignee, unless there has been an actual survey made on board the vessel, by the wardens of the port, or other officers, and, on such survey, the surveyors shall have found that the goods were properly stowed, and were damaged on the voyage by the perils of the sea. That by a similar usage, as between the assurers and the assured, the survey, so made by the wardens, is a document indispensable to be produced, in order to charge the underwriters, and that the preliminary proof is deemed insufficient, unless such document be exhibited as a part of it."

The presiding Judge rejected the evidence so offered, and decided that the preliminary proofs were sufficient. To this opinion the counsel for the defendants excepted.

The plaintiffs then introduced their evidence in chief, and among other testimony, read the deposition of one *William Guin*, the stevedore who stowed the cargo of the *Corinthian* at Liverpool, and who testified, as to the condition of the cargo, when it was shipped, and as to the manner in which it was stowed. The counsel for the defendants objected to the testimony of Guin,

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upon the ground, that he would be liable for any damage, arising from the bad stowage of the cargo: that his evidence, as it tended to charge the underwriters, would discharge himself from such liability, and that he was, therefore, interested in the event of the suit.

This objection was overruled by the Judge, and his opinion excepted to by the counsel for the defendants.

The plaintiffs then introduced the depositions of several persons examined at Liverpool and Manchester, under a commission issued for that purpose, and called witnesses also to show the condition of the packages in question, at the time of the importation.

From the evidence, obtained in England, it appeared, that the goods were purchased by the plaintiffs at Manchester, and forwarded from thence to Liverpool in boats, in the usual mode, to be there shipped. It was proved that the articles were in perfect order, when packed at Manchester, and their external appearance at Liverpool did not indicate that any injury had happened to them, on their passage to that place, from Manchester. They were not particularly examined at Liverpool, and the witnesses would not take it upon themselves to say, that the goods could not have been damaged, before they were shipped at that port. The stevedore and others testified, that the cargo of the Corinthian was properly stowed, and that there was no appearance of any injury to the packages, at the time of their shipment. It further appeared, that the vessel encountered much tempestuous weather on her passage, and that other parts of her cargo were damaged. When the packages were landed at New-York, there was no external appearance of injury, but upon their being opened, the damage was immediately visible. The goods were much spotted, and the injury appeared to have been produced by dampness.

One of the wardens of the port of New-York testified, that he, together with another warden, examined the goods in question, after their arrival in the store of the plaintiffs, and at their request, on the 21st of January, 1826. After a survey, they reported to the wardens' office, that they were damaged on the voyage of im-

portation, but they did not report, that they were damaged by sea-water, as the certificate showed, and the witness supposed that the injury was occasioned by moisture, produced by exhalations from water in the vessel. The survey was made for the purpose of procuring a remission of duties, and the cause of damage was not, therefore, accurately ascertained by the wardens.

The plaintiffs also produced other testimony to the same point, which, although it did not demonstrate that the goods were not damaged before their shipment at Liverpool, was yet sufficient to allow the jury to draw the inference, that the injury was sustained after the shipment, on the voyage of importation, and from the perils of the sea.

On this state of facts, the counsel for the defendants moved for a non-suit, upon the ground, that the plaintiffs had not made out a case of loss by the perils of the sea. This motion being denied, an exception was taken to the opinion of the Judge.

The counsel for the defendants then offered to prove, in bar of a recovery, on the part of the plaintiffs, the same general usage of trade; which they had before offered to prove in support of their objections to the sufficiency of the preliminary proofs.

The Judge decided, that the evidence so offered was admissible and might be received, as matter proper for the jury, in determining the question as to the stowage of the goods on board the vessel, or their condition at the time they were shipped or delivered, or the want of good faith on the part of the master, or other persons, on board the vessel: but that, if the fact of such usage should be established, the departure from it in this instance, was not a conclusive bar to the plaintiffs' right of action.

The counsel for the defendants declared, that they offered the proof of such usage solely as a bar to the right of action, on the part of the plaintiffs, and not for the purpose, for which it had been ruled by the Judge to be admissible.

The evidence, under this view of the case, being overruled, the counsel for the defendants again excepted to the decision of the Judge. The cause was then submitted to the jury, who found a verdict for the plaintiffs.

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*Mr. J. Duer*, on the part of the defendants, now moved for a new trial, and contended, that the parol evidence of usage should have been received. If not admissible to show the insufficiency of the preliminary proofs, it ought to have been received in bar of the action. The objection is, that such proof would vary the terms of the written contract. But usage of trade may be proved, for the purpose of giving a construction to the contract, and even to fix upon it a meaning different from that which the words would otherwise import. The parol proof, in such cases, does not vary the contract: it only explains it, and shows the sense in which the terms are used. [2 Salk. 443. 2 Doug. 510. 1 Ves. Sen. 457. *Robertson v. French*, 4 East. 135. *Coit v. Com. Ins. Co.*, 7 Johns. Rep. 387. 7 Cow. Rep. 202. *Phil. on In.* 14. 487. 2 Marsh. on In. 707. 3 Stark. Ev. 1034 and 5.]

The usage, which the defendants offered to prove, was reasonable in itself, and is not opposed by any suggestions of policy. In cases of damage to goods on their voyage, the master and owner of the vessel are, *prima facie*, liable for the injury, from the terms of the bill of lading. What ought the proof to be which is to discharge them from this liability? Not such evidence as was offered at the trial; for if that be sufficient, the master will never lack the means of defending himself against every attempt to make him responsible.

The usage in question does not prevail, perhaps, in foreign ports, although there are others analagous to it. But if it prevails here, it is sufficient; for the contract was made where the usage obtains, and in reference to it. Besides this, the usage is recognized by the statutes which establish wardens of the port. [2 R. L. 459. vol. 5, 11 a. p. 42, ch. 18.] The act points out the duties of the wardens, and directs that damaged goods shall be sold under their care. If the usage were not founded in justice and good sense, it would not continue; and when a mercantile contract is made at a place where an established usage prevails, having reference to the subject of the contract, the law considers the usage in some cases as part of the contract, and, at all events, the contract is

subordinate to the usage. So in this case, there was an existing usage, well known to the plaintiffs, which they might have complied with, without injury to themselves, and in a manner which would have given satisfaction to all parties. But it has been wholly disregarded by the plaintiffs, and they have thus voluntarily deprived themselves of the evidence, which the law requires to establish their claim.

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II. The deposition of *William Guin*, the stevedore at Liverpool, ought not to have been read in evidence, because the witness had a direct interest in the event of the suit. He was the only witness who testified that the cargo was well stowed, and although he may not be *prejudiced* by the result of *this* action, yet, if the defendants prevail, and an action were brought against the master upon the bill of lading, and a recovery were had against him, the stevedore would be liable over to the master. But if the plaintiffs prevail, then there can be no action against the master, for this recovery will be conclusive in his favour. The stevedore, therefore, is directly interested in the event of the suit. [5 *Bos. & Pul.* 374, *Simmonds v. Delacour.*] There are cases, it is true, where an agent may be called as a witness from necessity; but where the same facts may be proved by other persons, then the agent is not an admissible witness. An agent can never be called to disprove his own imputed negligence, neither can the master of a vessel be permitted to disprove barratry. [3 *Stark. on Ev.* 1184. *Ib.* part 4, 768, and note; also, p. 1730 of same book.]

In this case, the record of recovery against the insurers would be conclusive in favour of the stevedore, if an action were to be brought against him by the master for negligence; and he was not called from necessity, for the same facts might have been proved by other witnesses, or by a survey. A witness can never be called to prove his own diligence, and yet this stevedore was produced for the express purpose of showing, that he discharged his own duty with fidelity and skill. He was not competent by the rules of evidence, and his deposition ought not to have been read to the jury.

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III. The plaintiffs did not produce the best evidence attainable to establish the loss, and that which was adduced, did not *affirmatively* show it: the motion for a non-suit ought, therefore, to have been granted.

There is no better rule of evidence, and none better established, than that the party shall produce the best evidence in his power. If the party has better evidence, and refuses to produce it, the inference is, that the evidence, if produced, would be against him. Here the plaintiffs called a seaman to prove that the vessel encountered bad weather, but it is not pretended that the injury arose from this cause. Why did they not discharge the master and call him, or why did they not call the mates and seamen, to show the actual condition of the goods, both at the time of shipment and at the time of delivery?

True it is, evidence was produced from Manchester and Liverpool, to show, *that so far as the witnesses knew*, the goods were shipped in good order at Liverpool. But these witnesses could only say, that the goods, when they arrived at Liverpool, were, to all *external appearance*, in good order. But that proved nothing; for the packages were not externally injured when they arrived in New-York. The plaintiffs were bound, therefore, to show, not only that the goods were properly packed at Manchester, but that they were safely transported to Liverpool. Not having done this, the inference is, that the goods were damaged on their passage from Manchester to Liverpool, or before their shipment on board the vessel.

The evidence, surely, was not sufficient to charge the master, and the plaintiffs were bound to produce, at least, as much evidence against the defendants as would have been sufficient to render the master liable. The verdict is not, therefore, sustained by the proof, and upon every principle, there ought to be a new trial.

But the plaintiffs were bound, at all events, to produce the certificate of a survey *on board the vessel* by the wardens, among their preliminary proofs, and in this respect they were fatally defective.



*Mr. Slosson*, for the plaintiffs, *contra*, contended, that the preliminary proof of loss was sufficient. The sufficiency of such evidence, is a question of law for the Judge; and proof as to the existence of a usage, which could only be tried as a fact by the jury, was clearly inadmissible. [11 *Johns. R.* 259. 9 *Ib.* 192. *Phil. on In.* 498.]

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Preliminary proof is merely reasonable information, given at the time of the loss, and before the proofs in chief can be obtained. It is furnished for the purpose of putting the defendants upon enquiry, so that they may decide, whether to pay within the thirty days or not. The defendants can never offer facts to the Judge, to contradict the preliminary proof, because such facts are always evidence in chief, to be submitted to the jury. [*Haff v. The Col. Ins. Co.*] If the defendants are right, the plaintiffs never can recover, because the survey was not held on board the vessel, and, of course, their preliminary proofs must forever remain insufficient.

II. The usage which the defendants offered to prove, was inadmissible to control or defeat the express contract between the parties.

The jury have found, from the evidence before them, that the goods insured were injured by the perils of the sea, and the defendants now seek to vary the terms of their own agreement, by proving a usage which is to control it. They seek to incorporate it into the contract. But the usage contradicts the contract; it alters it in its most essential features; it makes a new proviso. Is the right of the plaintiffs to recover, to depend upon a certificate of the wardens of the port of New-York, over whom they have no control,—and that too in relation to facts which are not, and cannot be, within their personal knowledge?

It is a fixed rule of law, that nothing can be introduced into this solemn instrument, which the parties have not themselves put there, in express terms. Under the rotten clause, the survey is incorporated into the policy by express agreement; but here it is sought to bring, *by custom*, a new proviso into a written contract, and, in fact, to change the agreement entirely.

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But the consequences to which this must lead, are not to be overlooked ; for the usage, if it can discharge the defendants, must be extensive enough to charge the master. This cannot be. [10 *Mass. R.* 26, *Homer v. Dorr.* 2 *Johns. R.* 335, *Frith v. Barker.*]

Usage, if it exist, may well apply to the *mode* in which a contract is to be performed. As for instance: to depart with convoy, to stop at the usual ports for refreshments, &c. But in *these* cases the usage is not brought in to *explain* the contract, or the manner of its performance ; but it establishes the proof which the *plaintiff* must produce before he can recover. No case can be found to sustain this demand.

The proof of the usage is not only illegal, but the *usage itself* is wholly unreasonable. In what manner are the rights of the *plaintiffs* to be concluded ? By the acts of a third person ? The *omission* of the *Master* to call a survey on board his ship, is to defeat the right of the *plaintiffs* to recover against the underwriters!

Suppose the wardens had certified that the goods were *not* damaged on the voyage of importation, and that they were improperly stowed,—could that certificate have concluded the *plaintiffs* ? The defendants have agreed, that if damage be sustained by the *plaintiffs*, they will indemnify them. The *plaintiffs* have a right to *prove* that damage in their own way, to the satisfaction of the proper tribunals. If such a certificate had been presented among the preliminary proofs, it would not have debarred the *plaintiffs* from recovering under their proofs in chief.

Suppose the certificate had been in favour of the *plaintiffs*—would that have concluded the *defendants* ? The rights of no man can be concluded before he has had an opportunity to be heard. [*The Mary*, 9 *Cranch*. 136, 142. 15 *Johns. R.* 140. 1 *Stark. on Ev. pt. 1. Sec. 70, 72, p. 96.*]

Among the proofs in chief, the Judge offered to receive the evidence for every purpose, except as a conclusive bar to the action. The defendants declined this offer, and we are brought to the naked point, whether this usage, if proved, be not a bar to the action. [HOFFMAN, J. Can any case be found to sustain this position ? *Slosson.* Not one.]

The want of a protest is never a bar : it is proper evidence to show neglect or want of good faith, but it has never been considered as any thing more than evidence for the jury. Where the parties, by express agreement, substitute the wardens' survey for all other proof, it may be binding, but otherwise it cannot be.

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1822.

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III. The testimony of Guin, the stevedore, was properly admitted, as well on the ground of necessity, as because the verdict in this cause could not be evidence for or against him. He was employed by the master, and was, as to the owners, a sub-agent. The owners could not sue him, but their remedy would be against the master.

The plaintiffs were not bound to show, that the cargo was properly stowed : that will be presumed in the first instance ; but being willing to support the affirmative, they called the person who best knew in what condition the cargo was. The witness had no interest even in the question, and, *a fortiori*, he had none in the event of the suit.

The rule upon this subject, as laid down in the 3d of *Johns. Cas.* (82,) and in the 14th *Johns. Rep.* (79,) is well established on principle ; and the verdict in this case could not be given in evidence in another suit against the witness, either as to the fact of negligence, or as to the quantum of damages : neither would the success of the plaintiffs, in this cause, be evidence in his favour, especially when procured by his own testimony. If he were sued by the master, this record could not be evidence against him, for he is neither party nor privy. This is an action of *assumpsit* ; that would be in *tort*, for negligence. It is an acknowledged principle, that no verdict can be given in evidence *against* a party unless it might also be given in evidence *for* him : and here it will not be pretended, that this verdict could be evidence in favour of the witness.

But the witness is, at all events, competent from necessity. [2 *Stark. pt. 4*, 767.] He was a mere agent, for a specific purpose ; so is the master, so are the mates, and so are the seamen. The same rule, which will exclude one will exclude all, and the plaintiffs might thus be deprived of every witness ; for each agent

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is responsible, in some degree. The quantum of interest, cannot vary the rule, and the witness is admissible upon the clearest principles of evidence.

[HOFFMAN, J. It is the common practice to call the stevedores, to show the manner in which the cargo is stowed.]

IV. There was sufficient proof, to show affirmatively, that the injury to the goods arose from sea damage, and the jury were competent to weigh all the circumstances tending to establish that fact. The goods were packed in perfect order, at Manchester; they were forwarded to Liverpool, by the ordinary passage boats, and received there, apparently, in good condition. The vessel in which they were shipped, encountered bad weather on her passage, and other parts of her cargo were damaged by salt water. The inference is irresistible, therefore, that these goods were damaged on the voyage of importation. At all events, the tribunal most competent to decide this question, has put it at rest by their verdict; and in the absence of all evidence on the part of the defendants, this court will not disturb the decision.

*Mr. Duer*, in reply. If the contract implied by the usage, would be valid when inserted in the policy, then it is also valid if the usage can be clearly proved. The contract is made in reference to the usage, which is within the knowledge of both parties, and it is considered by the law as if it were incorporated into the written agreement. It is a part of the contract, and the parties, in contemplation of law, had the usage in view when the policy was executed. It is, therefore, available to the defendants, in the same manner in which it would be, were the usage expressly referred to by the terms of the agreement.

It is said by the counsel for the plaintiffs, that it is unreasonable to require, that the evidence of sea damage should be produced by third persons, who may withhold it. But the argument proves too much; for the same objection would apply to the preliminary proofs, and yet there can be no cause of action until these are made satisfactory to the Judge. There is no hardship in requiring that the goods should be left on board the ship, until a survey could be held; and, if they are removed before that can take

place, the removal is tantamount to a declaration, that they are free from sea damage.

As to the evidence of the stevedore, the effect of a verdict in favour of the plaintiffs, would be to discharge him from his liability. It would prove that the goods were well stowed, and the defendants could maintain no action against him. As an agent is admitted as a witness only from necessity, take away that necessity, and he becomes incompetent. Here there was no necessity for calling the stevedore, and his testimony ought to have been rejected.

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OAKLEY, J. This was an action on a policy of insurance on goods shipped from Liverpool to New-York. The claim was for damage sustained by the perils of the sea. On the arrival of the ship at New-York, the goods in question were landed before the wardens of the port had held a survey upon them.

At the trial, an objection was made, that the preliminary proofs were insufficient, because such a survey was not shown; and in support of the objection, the defendants offered to prove, that "by the usage of trade of this port and other ports, the master of the vessel is, in all cases, responsible for any damage sustained by goods delivered by him to the owner or consignee, unless there has been an actual survey on board the vessel by the port wardens, by which it shall have been found, that the goods were properly stowed, and were damaged on the voyage by the perils of the sea; and that by a similar usage, as between insurers and assured, the survey so made, is a document indispensable to be produced, in order to charge the underwriters: and that the preliminary proof is deemed insufficient, unless such a document is exhibited as a part of it."

The Judge overruled this objection, and held the preliminary proofs to be sufficient, and, I think, correctly.

The clause in marine policies, requiring preliminary proof of interest and loss, has always been liberally expounded, and is construed to require only the best evidence of the facts possessed by the party at the time. [*Barker v. Phenix Ins. Co.* 8 Johns. R. 317. *Lawrence v. Ocean Ins. Co.* 11 Johns. R. 260.] The suffi-

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denial of it, is always a question of law, to be determined by the Judge at the trial; and no evidence can be then received to alter the character or effect of the proofs exhibited to the defendants.

In the present case, the Judge was called upon to hear evidence of a usage controlling the construction of the policy, so as to render necessary the production of a particular document as a part of the preliminary proofs. If such evidence had been admitted, counter evidence on the part of the plaintiffs, to repel the usage, must have been gone into; and thus the Judge would have been drawn into the trial of a fact, instead of confining himself to the decision of the law, as arising upon the state of the proof, as exhibited by the plaintiffs. This, in my judgment, is clearly inadmissible.

The usage in question, if it could avail the defendants at all, would be a bar to the plaintiffs' right of action; and in this view, it was also offered to be proved at the trial. The Judge again properly rejected it.

The rule as to the admission of usage, to control the construction of a policy, seems to be, that it may be resorted to, to fix the sense of particular terms in the instrument, where they have acquired a peculiar meaning, as between the assurers and assured. [*Coit v. Com. Ins. Co.* 7 Johns. R. 389.] In this light, its effect is not to alter the contract of the parties, but merely to ascertain what that contract is. But it is well settled, that a usage can never be set up to affect or vary an express agreement; nor to contradict a rule of law. [*Früh v. Barker*, 2 Johns. R. 335. *Homer v. Dorr*, 10 Mass. R. 26. *Phil. on Ins.* 17, 18.]

By the terms of the policy in the present case, the defendants bound themselves to pay all damage to the property insured, arising from the perils of the sea: and the attempt now made, is to introduce into the contract a condition, that they shall not be responsible, unless such damage is ascertained in a particular mode, and that, too, by the act of third persons, over whom the assured have no control. Such a condition would, in my judgment, vary the legal obligations of the defendants, as ascertained by the plain language of the policy. It would be creating a con-

dition precedent to the plaintiffs' right of recovery, where the contract itself expresses none.

The usage in question, is also, in my judgment, unreasonable. The survey, when produced, is not to conclude either party, as to any fact stated in it. It is not to be evidence on the trial, even *prima facie*, for or against either party. The non-production of it is to be fatal to the plaintiffs' action; but when produced, it is to prove nothing.

An objection was also taken at the trial by the defendants to the competency of the witness, *Guin*. He was the stevedore employed by the master to load the vessel at Liverpool, and was examined to prove that the cargo was properly stowed. It is contended, that he was interested to support the plaintiffs' right of recovery.


The general rule on this subject, as laid down by the Supreme Court, is, that "if a witness will not gain or lose by the event of the cause, or if the verdict cannot be given in evidence for or against him, in another suit, the objection goes to his credit only, and not to his competency." [*Van Nuys v. Terhune*, 3 Johns. Ca 83. *Case v. Reeve*, 14 J. R. 81.]

The witness, in the present case, is clearly not excluded by this rule. He gains or loses nothing by the event of this suit, nor can the plaintiffs' recovery release him from his responsibility for any negligence committed by him, as the agent of the master. Nor can the verdict or judgment in this cause be given as evidence, in any action against him, either to establish the fact of such negligence, or to ascertain the amount of damages. "It is a general, if not universal, principle, that a suit between two persons, shall not bind or affect a third person, who could not be admitted to make a defence, to examine witnesses, or to appeal from the judgment." [*Case v. Reeve*, 14 J. R. 81.] A verdict or judgment in an action, is evidence in another, only for or against privies in blood, or estate, or in law. [*Ibid.*] The witness in the present case is neither. He was merely an agent of the master, and as such, is competent to testify as to all matters in the ordinary course of his agency. [2 *Starkie on Ev.* 767.]

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If the action had been directly against the master for negligence in the loading of the vessel, his immediate agent in the performance of that work, would not have been a competent witness for him, without a release; for, in case of a recovery against him, the verdict might be given in evidence against the agent, to ascertain the amount of damages. [*Green v. The New River Company*, 4 T. R. 590. *Case v. Reeve*, 14 J. 82.] Here the master is no party to the suit, and the fact of negligence, in the loading of the cargo, is not directly in issue. The witness, in my judgment, was properly admitted.

An objection was also taken, that the evidence did not support the plaintiffs' right of action; but there was some proof of damage to the goods, by the perils of the sea, and it was properly submitted to the jury, who were the proper judges of its sufficiency.

*Motion for new trial denied.*



DANIEL A. PHOENIX AND SAMUEL WHITNEY

VERSUS

JACOB D. STAGG.

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1838.Phoenix and  
Whitney  
v.  
Stagg.

To an action of debt, on judgment, the defendant pleaded a discharge under the act to abolish imprisonment for debt. The plaintiffs replied, that, on the day appointed for the appearance of the creditors to show cause against the discharge, a certain creditor appeared to oppose the application, when the defendant, to induce said creditor to withdraw his opposition, secured to him the payment of one half of his debt; whereby the plaintiffs withdrew their opposition, and the defendant obtained his discharge. Issue was taken on the replication, and a verdict found for the plaintiffs. The defendant then moved in "arrest of judgment" or for "some order directing an entry on the record, qualifying the judgment, so that no execution should issue against his person." HELD, that the facts stated in the replication, (though found to be true,) were not so pleaded as to avoid the discharge; and that the judgment, although it could not be arrested, must be so modified as to prevent the execution from issuing against the defendant's person.

*A defendant cannot move for judgment non obstante veredicto.*

THE plaintiffs declared against the defendant in an action of debt, upon a judgment obtained against him by the plaintiffs in "the Supreme Court of the State of New-York," at the May term of said Court, in the year 1827, for the sum of eleven hundred and forty-four dollars and thirty-seven cents.

The defendant, for the purpose of protecting his person against the consequences of a recovery in this court, but without pretending to impeach the judgment on which the action was founded, pleaded, "that the said plaintiffs *ought not to have execution* for the "debt aforesaid," "adjudged to them, on or against *the person* of "him, the said defendant, because," "after the rendition of the "said supposed judgment, and before the commencement of this "suit, viz. on the 4th day of January, in the year 1828," the defendant "being an insolvent debtor, within the meaning of the act "of the Legislature of the State of New-York, entitled an act to "abolish imprisonment for debt in certain cases, did present a petition to Richard Riker, Esq., Recorder of the city of New-York," "praying that his estate might be assigned for the benefit of all

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"his creditors, and that his person might be for ever thereafter  
"exempted from all arrest or imprisonment for or by reason of  
"any debt or debts due at the time of making such assignment,"  
&c. The plea then averred, that such proceedings were there-  
upon had; that afterwards, viz. on the 25th of March, in the year  
1828, the defendant was discharged by the said Recorder, as fully  
appeared by the record of the discharge, which was set out in the  
usual manner.

To this plea, the plaintiffs replied, that they "ought not to be  
"barred from having execution of the debt aforesaid," "against  
"the person of" the said defendant, because, "on the day ap-  
"pointed by the said" "Recorder," "for the creditors of the  
"said defendant, to show cause before him," "why an assign-  
"ment of the said defendant's estate should not be made for the  
"benefit of all his creditors," &c., "to wit, on the 25th day of  
"March, 1828, at the office of the said Recorder, in the city of New-  
"York, one Samuel Judd, being a creditor of the said defendant,  
"within the true intent and meaning of said act, appeared before  
"the said Recorder, to show cause why the said defendant should  
"not be discharged as aforesaid, and commenced opposition to  
"the said discharge, before the said Recorder. And, therefore,  
"the said defendant, in order to induce the said Samuel Judd to  
"withdraw his opposition to the discharge of the said defendant,"  
"offered to, and did secure to be paid to the said Samuel Judd,"  
"a certain part or portion of his debt or demand, to wit, the one  
"half thereof. Whereupon, the said Samuel Judd, so being such  
"creditor of the said defendant in consideration thereof, to wit,  
"on, &c., at, &c., aforesaid, did withdraw his opposition, and  
"thereupon the said Recorder executed and delivered to the said  
"defendant the said discharge in the plea mentioned, and so the  
"said plaintiffs say, the said discharge was fraudulently obtained,  
"and is void," &c.

The defendant rejoined, taking issue upon the replication, and  
denying that Judd ever did show cause why the defendant should  
not be discharged, and denying that he ever made opposition to  
such discharge before the Recorder; "without this, that the said  
"defendant, in order to induce the said Samuel Judd to with-

"draw his opposition to the discharge of the said defendant," "offered to, and did secure to be paid to the said Samuel Judd," "any part or portion of his debt or demand," &c., with a conclusion to the country.

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Upon this issue, a verdict was found by the jury in favour of the plaintiffs, and the defendant now moved "in arrest of judgment, or for some order of the court, directing an entry on the record, qualifying the judgment to be entered for the plaintiffs, so that no execution should issue thereon against his person."

*Mr. Elias H. Ely*, for the defendant, and in support of the motion, contended, that the judgment might be arrested, or at least modified, under the pleadings, because the issue joined, although found in favour of the plaintiffs, did not impair the discharge. The defendant, he said, would, of course, be entitled to the benefit of the plea, which asks merely for a personal privilege, unless there was something in the replication which avoided or destroyed its effect. The plea sets forth the discharge *in hæc verba*, and if the defendant is to be deprived of the benefit of his plea, it must be for some cause set forth in the replication.

In the first place, the discharge itself cannot be impeached: it is a *record*, and imports absolute verity: it concludes all parties and privies, and creditors are of course parties. Even if there was fraud as to the manner of procuring the discharge, that would not avail against the discharge, except for the causes set forth in the statute. Fraud, in the consideration of a *deed* cannot be inquired into *at law*, and nothing comes up before such a tribunal but questions relative to the *sealing*. [1 *Johns. R.* 300. 2 *J. R.* 177. 13 *Ib.* 430. 5 *Cow. R.* 506, 510. 8 *Ib.* 177. 290.] In the case cited from the 13th of Johnson's Reports, it was expressly decided, that all creditors who did not appear and oppose the discharge, *assented* to it; and here these plaintiffs having neglected to appear when notified to do so, if they had cause, have assented to the discharge.

II. It is admitted, that the plea may be avoided by a replication, setting forth any of the facts stated in the statute, which de-

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stroy the discharge. There acts are all set forth in the 5th section of the act, [5 Vol. R. L. p. 117. Sess. 42, ch. 101.] and the discharge cannot be avoided by any thing except the causes set forth in that section. These are, 1. perjury ; 2. a concealment of property, and, 3. the receiving a debt after the discharge.

Now the cause set forth in the replication, is not one of those enumerated : it states, that the defendant offered to secure, and did secure, to one Samuel Judd the payment of one half of his debt, if he would withdraw all opposition to the defendant's discharge. *Non constat*, that the one half of Judd's debt was paid by any part of the defendant's effects. It is not asserted that the fund assigned for the benefit of all the creditors, was made less by the payment made to Judd. Neither does it appear, that the creditors have suffered in any way by the acts of the defendant, set forth in the replication.

For these reasons, *Mr. Ely* contended, that the judgment ought to be arrested or modified, so as to give the defendant the benefit of his plea, because there was nothing set up in the replication which could, in law, deprive him of the protection afforded by his discharge.

*Mr. D. B. Tallmadge*, for the plaintiffs, *contra*, contended,

I. That there were facts enough averred in the replication to avoid the discharge. No matter whether the fraud alleged be that specified in the act or not, so long as it is one against the law or the policy of the law. It has been decided repeatedly, that frauds not set forth in the act are sufficient to avoid any securities taken by a creditor for withdrawing his opposition. [2 J. R. 386. 4 *Ib.* 410, and note to 2d Ed. 12 J. R. 306. 3 *Caines' R.* 213. 9 J. R. 295.]

II. But the fraud contained in the replication is specified in the 5th section of the act. *It is concealment of part of the debtor's effects.* The insolvent "secured to one Judd a part of his debt, to wit, one "half." The fair intendment of this allegation is, that the insolvent secured it out of his effects, not contained in his inventory. This

is a concealment within the meaning of the act, and it need not be averred in terms. It is sufficient, if facts enough are set forth from which fraud may be inferred; for on a motion in arrest of judgment, every intendment is against the party moving and in favour of the pleading attacked. Whatever by possibility might have been proved under the issue, will be intended to have been proved. [2 *Tidd's Prac.* 826. *Steph. on Plea.* 126.] Therefore, as under that issue, we might have proved that the insolvent bought off Judd's opposition, by giving to him a note due and owing to the insolvent, it will be intended that we did, in fact, prove it; and such proof would be conclusive evidence of concealment within the letter of the 5th section. This mode of securing Judd's debt, is the probable one, and the court will infer that it was adopted.

Fraud may be inferred from the facts stated in the replication, which is concluded by a direct averment that the discharge is void by reason of fraud. The jury have found all the facts to be as stated in the replication, and the conclusion also: that conclusion is *fraud*.

But, it is said, that if Judd was bought off, the fund was left entire, and the creditors thereby benefitted. In reply, we say, that if Judd had not been bought off, the defendant *would not have been discharged*, and the plaintiffs would have been left in possession of all the remedies against their debtor known to the law.

III. The insolvent was guilty of *false swearing*, within the meaning of the 5th sec. of the act. The act provides, that an insolvent shall not settle with any of his creditors with a view to obtain the benefit of the act, and the party is required to swear, that he has not so settled. Is the act complied with, if the oath be true when taken, but becomes false immediately afterwards? The spirit of the act extends to proceedings as well subsequent to the oath as precedent thereto, and to settle with a creditor, after the oath has been taken, is a violation of the spirit of the act.

The act 5 Geo. 2, c. 30, sec. 10, requires the bankrupt to make and present to the Chancellor an affidavit, stating "that the certificate and consent of the creditors thereunto were obtained

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"fairly and without fraud." In the case of *Rodson v. Galze*, [Doug. 228,] notes had been given by a confidential friend of the bankrupt without his knowledge to two of his creditors, whereby they were induced to sign the certificate. The bankrupt made the affidavit required by the statute, and was afterwards informed of the acts of his friend; subsequently to this he presented his affidavit to the Chancellor. Upon these facts, WILLES, J. observed, that it was "a fraud in the bankrupt to present his affidavit to be read at the time when the certificate was allowed; for though it might be true when sworn to, it certainly was not true then, and therefore the certificate was void." BULLER, J. observed, "that the certificate would not have existed, but for means which the legislature had reprobated."

IV. But if the fraud set forth in the replication be not sufficient to avoid the discharge, the defendant cannot take advantage of it, by a motion in arrest of judgment. The plaintiffs are entitled to judgment, first, by *nil dicit*, and secondly, because the plea does not go to the cause of action, but merely to qualify the judgment. As to the cause of action the defendant says nothing. [Doug. 393, 1 Cow. R. 207.] Judgments cannot be arrested, according to our statute, for mere defects in form, and since the act no case can be found where a judgment has been arrested, except for defects in the declaration: none for defects in any subsequent pleading. If the defendant objected to the replication, he should have demurred, and that was the only course by which his objection, if well taken, could be sustained by the court.

*Mr. J. Anthon* for the defendant, in reply.

The plaintiffs might have judgment by *nil dicit*, if they had given the defendant the benefit of his plea. They were not bound to join issue, but might have had judgment without the least delay. If, however, they seek to take from the defendant the privilege given to him by his discharge, they must state some valid reason upon the record, why the discharge is void. The court will not, *ex industria*, seek for causes to establish fraud, but will rather call upon the party who asserts its existence, to state it in

such clear and direct terms in his pleading, that the defendant may meet and rebut it if he can at his trial. If the defendant has been guilty of false-swearing his discharge is not only void, but he may be liable to the laws in another manner.

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Will not the court then, say, that every intendment of mere technical pleading is against fraud, and will they not rather compel the plaintiffs to aver with strictness all the facts upon which they rely to establish the fraud? The general conclusion that "*so the discharge was fraudulently obtained and is void,*" will avail nothing, unless the plaintiffs point out *how* it was fraudulent and void. This they have not done, and they are confined to their specific allegations. These, upon examination, turn out to be entirely inoffensive, if true, for there is no moral turpitude in paying or satisfying a debt which is justly due. The discharge, then, cannot be considered as void unless the defendant has done something which the act has forbidden him to do, and to ascertain that fact we must examine the act itself.

All the cases cited by the plaintiffs, are such as have arisen under the "*two-third act*," where the proceedings differ materially from those which merely exempt the person from arrest. In the one case all remedy for the *debt* is taken away; in the other the person only is exempted from execution. Under the act relating to non-imprisonment, it is no injury to one creditor that another has been bought off, unless it can be shown that his dividends have been thereby diminished. In this case, there is no averment that any part of the defendant's property was taken to satisfy the opposing creditor, and the court will not infer it, because such might possibly, or even probably, have been the case. If the plaintiffs rely upon the fact, let them state it, that the defendant may have an opportunity of denying it.

II. But has there been a *concealment* here in any shape, either within the meaning of the act, or in *fact*? Before Judd appeared to oppose, the defendant had made out a complete inventory of his property, which was surrendered to the assignee according to the inventory. How then could any part of this specified property be subtracted, for the purpose of satisfying Judd's debt?

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The whole case is narrowed down to the single enquiry, whether the defendant has violated the statute. Upon this point the discharge speaks for itself, and is conclusive. It states, that the defendant had "conformed in *all respects* to the matters and "things required of him, according to the true intent and meaning "of the act." How can this be gainsayed? The jury have found nothing more than this, that one Judd was paid or secured the one half of his debt? Does that deprive the defendant of the protection afforded by his discharge? If the oath was false the assignment was void, but the oath, the plaintiffs admit, was true when it was administered. If so, how can the statute operate retrospectively, even if the defendant did satisfy Judd *after* the oath was taken? The fifth section is an entire new enactment; it is not to be found in the two-third act, and the legislature intended to point out every thing which could avoid the discharge. This they have done, and the replication has set forth none of them. The issue joined is, therefore, immaterial, and the judgment may be arrested.

There is a distinction between an informal and an immaterial issue. [2 *Saund.* 319 *a.* 1. *Ib.* 227. 2 *Arch. Prac.* 239.] For the former defect, a motion in arrest cannot be sustained, but for the latter, it may.

The CHIEF JUSTICE, in delivering his opinion, remarked, that the question in this case was, whether the facts stated in the replication were sufficient to avoid the defendant's discharge; for the court would infer, that all the facts upon which issue was taken, had been found by the jury.

The replication alleges, that in consequence of a compromise made by the defendant with one of his creditors, that creditor was induced to withdraw the opposition to the defendant's discharge, which he otherwise would have made. Suppose the fact to be so: does it follow as a necessary or inevitable consequence, that the compromise was fraudulent? Suppose the defendant was attended to the Recorder's office by some friend, and that friend being informed of the creditor's intended opposition, had himself advanced the money to effect the compromise: would the other creditors of the defendant have been prejudiced, by such a course



of proceeding? The entire fund, assigned by the debtor, would still have gone to his assignee, and it would, in that case, have been divided among a smaller number of creditors. By this means, the creditors would have been benefitted, and could not, with any reason, complain of the defendant's acts in this particular. The court will not *infer*, that the acts done were fraudulent, because the replication, in its conclusion, asserts, that the discharge was fraudulent; but they will look at the facts stated, and ascertain from them whether the law has been violated.

In order to impeach the discharge, the court must infer, that the defendant subtracted a part of the funds, which would otherwise have gone to the creditors in general, and gave it to a particular creditor, for the purpose of inducing him to withdraw his contemplated opposition. This is not averred in the pleadings, and will not be intended, where such intendment must cast upon the defendant the perpetration of a fraud, and break up so solemn an instrument as a discharge, under the seal of a competent officer.

There is another reason why the allegations in the replication are not entitled to the particular favour of the court. When the defendant presented his petition to the Recorder, notice was directed to be given to all the creditors, to appear and show cause, if any they had, why the prayer of the petition should not be granted. That notice must have been given to the plaintiffs, among others, because the discharge itself avers, that satisfactory evidence was furnished to the Recorder, that *all* the requirements of the act had been complied with. If the plaintiffs intended to oppose the defendant's discharge, why did they not appear at the proper time and place, and show cause? By not appearing, they acquiesced in the discharge, and are concluded by it. The discharge is by the act itself, made conclusive evidence as to the facts which are asserted in it, and from *that*, nothing appears to shew the compromise, or impeach the discharge. It is, then, sufficient to afford the defendant all the protection which is sought in his plea, and must be made available for that object.

The next question is, can the judgment be *arrested*? According to strict technical principles, I think it cannot; but it may be

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*modified* in such way as to meet the exigency of the case. Where the law affords to an insolvent debtor a privilege, which is to protect his person, the court may always point out the means by which it may be made available. The only part of the judgment complained of, is that which relates to imprisonment, and that must be modified by a special entry, which shall protect the debtor's body. The plaintiffs will thus have their judgment, and the defendant, the protection asked for in his plea.

OAKLEY, J. This is an action of debt on judgment. The defendant, to protect his person against execution, interposes a plea of a discharge, obtained under the act entitled, "An act to abolish imprisonment for debt in certain cases." The plaintiffs reply in substance, that on the day appointed for the appearance of the creditors to shew cause, against the discharge, one *Judd*, a creditor of the defendant, appeared to oppose, and commenced his opposition to the said discharge, and that the defendant, "in order to induce the said Judd to withdraw his opposition, offered to, and did secure to be paid to him, the one half of his debt;" and he thereupon withdrew his opposition, and the defendant obtained his discharge. Issue was taken on this replication, and a verdict was found for the plaintiffs. The defendant now moves in arrest of judgment, or for some order of the court, directing an entry on the record, qualifying the judgment to be entered for the plaintiffs, so that no execution shall issue thereon against his person.

By the act, under which this discharge was obtained, [sess. 42. ch. 101, s. 2.] it is enacted, that the insolvent, on presenting his petition, shall make oath, among other things, that he has not settled with any of his creditors with a view to obtain the benefit of the act. Public notice is then directed to be given to the creditors of the insolvent, to show cause against his discharge, on a day to be appointed, and if no cause be shown, and the officer to whom the petition is presented, "shall be satisfied that the insolvent hath in all things conformed to the provisions of the act," he shall direct an assignment to be made of the insolvent's estate. The 3d section directs the discharge to be granted, upon proof of such assignment; and declares, that the discharge so granted, "shall be conclusive evidence in all courts within this state, of

"the facts therein contained." By the 5th section, it is enacted, that the discharge shall be void, for several causes particularly specified therein, among which, are the commission of any perjury by the insolvent, and the concealment of any of his estate or effects.

It is contended, on the part of the defendant, that the discharge cannot be impeached or avoided for any cause, other than those particularly enumerated in the 5th section of the act. This position appears to be fully supported by the case of *Lester v. Thompson*, [1 J. R. 300.] In that case, the discharge relied on, was obtained under the general insolvent act, which requires the assent of a portion of the creditors of the insolvent to the granting of his discharge. The 13th section of that act [1 R. L. 466.] enumerates the causes which shall render a discharge void, and its provisions are similar to those of the 5th section of the act now under consideration, as far as the nature of the proceedings under the respective acts will admit. In *Lester v. Thompson*, the fraud alleged against the discharge, was one not enumerated in the act, as it then stood. The plaintiff there contended, that any fraud on the part of the insolvent, in obtaining the discharge, would vitiate it. But the court said, that its validity could not be contested on any ground, other than those expressly reserved in the act itself. This seems to be fully in point in the present case.

It has frequently been decided, as suggested by the plaintiffs' counsel, that notes or securities given to a creditor by the insolvent or others, as a consideration for withdrawing his opposition to the discharge, are void, as being against the policy of the law. That principle cannot, however, be applied to the present case. The validity of the discharge itself, rests upon the express provision of the statute. A note, made under the circumstances above mentioned, is held to be void by the principles of the common law.

The plaintiffs further contend, that the facts set forth in the replication, show, that the insolvent was guilty of false-swearing, within the spirit and meaning of the 5th section of the act. The oath taken by the insolvent, at the time of presenting his peti-

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tion, was, that he had not settled with any of his creditors, with a view to obtain the benefit of the act. The facts set forth in the replication, certainly show a settlement with *Judd*, within the fair import of that clause of the oath. But we are not at liberty to refer the party's oath to a period different from that fixed by the statute. It was strictly true, for aught that appears at the time it was made, and acted on by the Recorder, and it would be over-leaping the plain terms of the statute, to refer it to a subsequent period, with a view to falsify it. In this respect, the case differs from *Robson v. Calze*, [*Doug.* 228,] cited by the plaintiffs' counsel. There, the affidavit of the party was true, as he supposed, when it was sworn to, but known by him to be false when laid before the Lord Chancellor, for the allowance of the bankrupt's certificate.

It is again contended by the plaintiffs' counsel, that the facts set forth in the replication, amount to an averment, that the insolvent *had concealed a part of his effects*. The allegation is, that he had secured to be paid to *Judd* a portion of his debt, and it is said, that we must intend that such security was given by an appropriation of the insolvent's own estate. Such intendment, I apprehend, cannot fairly be made. The security given to *Judd*, may have been by the intervention of some friend, and this will be presumed to have been the case, where a contrary intendment will charge the party with fraud.

On the whole, I am of opinion, that upon this record, the defendant is entitled to the protection of his discharge, notwithstanding the finding of the issue against him. The plaintiffs' judgment for the debt, must be so modified, as that no execution can issue against the defendant's person, and a special entry must be made on the record to that effect.

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The defendant's counsel, in the first instance, moved for judgment "*non obstante veredicto*, or for such other rule, or order, as the court might grant." They then contended, that the facts stated in the replication were all immaterial, and that, therefore, the de-

defendant might have judgment to the extent of his plea, and cited *Whittemore v. Adams*, [2 Cowen's R. 626.]

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Mr. Tallmadge, *contra*, contended, that the *defendant* could in no case, move for judgment, *non obstante veredicto*. It is the privilege of the plaintiffs to make this motion, while the defendant, on his part, is allowed to meet corresponding defects by a motion in *arrest*. In all cases where *this* motion prevails, a repleader may be awarded, and it is only made in cases of issues palpably immaterial.

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The Court ruled, that the *defendant* could not move for judgment, *non obstante veredicto*,\* in a case where it was clear that the *plaintiffs* were entitled to it. His object was, not to enter up a judgment in his own favour, but to cause that of the plaintiffs to be modified to the extent of his plea, which claimed nothing more than a personal privilege. They therefore refused *that* motion, and permitted the defendant to seek for relief in some other form. The defendant, therefore, subsequently made the motion reported in the case above.

[E. Curtis, *Att'y for the plffs.* E. H. Ely, *Att'y for the def't.*]

\* Vide *Smith v. Smith*, 4 Wend. R. 468.

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In an action upon a guaranty, where the defendant, relying upon the statute of frauds, pleads that "the promise mentioned in the declaration, is a special promise to answer for the debt of a third person, and that no note or memorandum in writing, shewing the consideration of such promise was ever signed by him," the plaintiff, if the consideration of the guaranty was the sale of goods to a third person, made at the same time with the guaranty, must set forth by his replication, what he would be bound to shew in evidence, if the statute were not pleaded. It must appear by the replication, that the sale of the goods and the making of the guaranty, were simultaneous acts, constituting parts of one and the same agreement.

The third and fourth counts of the plaintiff's declaration set forth, that one S. made certain promissory notes to the plaintiff, the payment of which, the defendant guaranteed, "in consideration of value received by S. and the defendant." The defendant having pleaded the statute, the plaintiff replied, setting forth a written promise of the defendant, containing copies of the notes which were expressed to be "for value received." The guaranty also set forth, "that in pursuance of the understanding" between the plaintiff and S., the defendant stipulated to pay the notes, if S. did not. *Held*, that the replication did not support the averments in the declaration; the contract there set forth, not appearing with sufficient certainty, to rest on the same consideration.

THIS case was formerly before the court, upon a demurrer to the plaintiff's evidence, [*ante p.* 201.] It was an action upon a guaranty given by the defendant to secure the payment of three certain promissory notes, made by one Scovell in favour of the plaintiff.

The declaration contained four counts. The two first were like those contained in the former declaration, and differed by confining the breach of the defendant's contract to the non-payment of the *second* note, merely.

The third count alleged, that Scovell, on the 5th day of December, 1827, made three several promissory notes in favour of the plaintiff, for the sum of three thousand five hundred and thirty dollars, and twenty-seven cents each: the first being payable in seven, the second in nine, and the third in twelve months after date. That the defendant, "*in consideration of value received by Scovell and him, the said defendant,*" undertook and promised the

plaintiff, "that he would guaranty the just and full payment" of the aforesaid notes "to the plaintiff, or his order." This count then averred, that the second of said notes had become due, but that the same had not been paid either by Scovell or the defendant, nor had the defendant guarantied to the plaintiff "the just and full payment thereof," although requested, &c.

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The fourth count was substantially like the third, but confined its allegations to the second note, omitting the others entirely.

The defendant relied upon the statute of frauds as a defence, and pleaded separately to each count of the declaration, that the promise therein mentioned as having been made by the defendant, "was a special promise to answer for the debt of a third person, to wit, for the debt of Noah Scovell;" and that "no agreement in respect of, or relating to, the said supposed promise, or any memorandum or note in writing, wherein the consideration for such promise was expressed, stated, and shown, according to the form of the statute in such case provided, was ever signed by the said defendant, or by any other person or persons, by him thereunto lawfully authorized."

To this plea, the plaintiff replied, that the promise mentioned in the declaration, "or the agreement in relation to the same," was in writing; and he set forth the notes of Scovell, and the special agreement of the defendant, exactly as they appeared in evidence in the former case. The replication then averred, that the consideration of the said promise was "expressed or stated in writing in the said agreement," "according to the form of the statute," and that "the said instrument in writing was signed by the defendant;" and prayed that the same "might be inquired of by the country."

To each of these replications, there was a separate general demurrer; and the cause was now argued by *Mr. J. Anthon*, for the defendant, in support of the demurrer, and by *Mr. Wilkes*, for the plaintiff.

*Mr. Anthon* contended: I. That the promise was a collateral one, on the face of the pleadings, and to be valid, should have the consideration expressed. II. That the consideration, as ex-

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pressed, is the understanding and agreement between Wheelwright and Scovell, which is unintelligible, without recourse to oral testimony, and, therefore, the promise is void. III. That the consideration expressed in the agreement, varied from the consideration averred in each of the counts, and, therefore, the replications were departures. The two last counts aver, that the consideration for the defendant's promise, was value received *by him and Scovell*; the written agreement disclosed by the replication, expresses "*the value*" to have been received from *Scovell alone*. This is a manifest departure from the declaration, and the defect may be taken advantage of by general demurrer. He cited the case of *Morley v. Boothby*, [3 Bing. R. 107,] as precisely in point.

Mr. *Anthorn* observed, that the agreement set up in the two first counts of the declaration, had already been before the court, when the case was presented by the demurrer to the plaintiff's evidence; and it was then decided, that the proof did not support the declaration. The court held, that the plaintiff had the right to show, that the credit given to Scovell, and the signing of the guaranty, were one transaction: and that if it were proved, that the two acts were concurrent, then one consideration would be sufficient to support both promises. But the court, at the same time decided, that the contract itself, upon its face, did not show, that the transactions were one entire agreement, and, therefore, that the declaration was not supported by the proof.

The defendant has not varied his case in relation to the two first counts, in any way, except by *pleading* that now, which he then *gave in evidence*. The court cannot *infer* that the two acts were concurrent; but, on the contrary, the fair presumption is, that Scovell's notes were made and delivered before the defendant's guaranty was given. If so, the contract was clearly void. [*Fell on Guar. p. 25, 37.*]

Mr. *Wilkes*, for the plaintiff, *contra*, contended, that the "value received," specified in the notes of Scovell, was the consideration, not only of the notes, but also of the guaranty, in which they were incorporated. Both promises were branches of the same contract, and founded on the same consideration.



The cases from the English books cannot be considered as authorities here, when they contradict the spirit of the decisions of our own courts. *Wain & Warlters*, so far as it has any application to this agreement, is expressly overruled by the case of *Leonard against Vredenburg*, [8 Johns. R. 39.] The plaintiff relies upon that case, as conclusive in his favour, and the doctrine asserted by Chief Justice KENT, is sufficiently comprehensive, to embrace every principle for which we contend. The strictness of the English courts in relation to proof of consideration under the statute of frauds, is not required by our tribunals; but effect will be given to a contract, where the requirements of the act have been substantially complied with. [*D'Wolf v. Rabaud, et al.* 1 Peters S. C. R. 477.]

But if the first and second counts be obnoxious to the objections raised, the third and fourth have a sufficient consideration expressed on their face, and which is proved by the agreement. It is stated in the declaration, that the defendant's promise was in consideration of "*value received*" by himself and Scovell. Here is a sufficient consideration *alleged*. The notes of Scovell are expressed to be for "*value received*," and these notes, with this consideration upon their face, are guarantied by the defendant. The consideration of *his* promise was this value received, and it was sufficient to uphold both contracts. This has been expressly decided: and these counts are fully supported by adjudged cases. [11 J. R. 221. 13 J. R. 175.]

The consideration of value received, is not inconsistent with that of goods sold; for the latter may, in fact, be the exact consideration embraced by the former; and in this view of the subject all the counts are good.

This is called a *collateral* undertaking, and, perhaps the use of that word may mislead us, if we suppose it contained in the statute of frauds. But, the act uses no such word. A contract may be *collateral* to another contract, and yet, *original* as to the party to be charged. His promise may be, to pay the debt of another, and yet, if made at the *time* of the principal contract, it is as much an original agreement, as the principal contract is. So in this case, the defendant's contract is original, although made to

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guaranty Scovell's notes. The only question is, whether the promise is in writing : and, in this respect, we have complied with the requirements of the statute.

**OAKLEY, J.** The first and second counts of the declaration, in this case, are substantially alike ; and set forth, that the defendant, on the 5th of December, 1827, in consideration that the plaintiff would sell and deliver to one *Scovell*, a certain quantity of goods, &c., promised the plaintiff to guaranty to him the payment of certain promissory notes, made by the said *Scovell* to the plaintiff, bearing date on that day. The delivery of the goods to *Scovell*, on the faith of the defendant's promise, is set forth, with the proper averments, showing a breach of the promise, on the part of the defendant. To these counts, the defendant has pleaded, separately, that the said promise of the defendant was a special promise, to answer for the debt of *Scovell* ; and that no agreement, in relation to it, in writing, wherein the consideration for such promise was shown, was ever signed by the defendant, or by any person authorised by him. The plaintiff replies, setting forth the written agreement, signed by the defendant, dated the 5th of December, 1827.

The replications then aver, that the consideration of the defendant's promise, set forth in the 1st and 2d counts of the declaration, is expressed in the said agreement, and that the same is signed by him. To these replications, there is a separate and general demurrer. The question arising on this written guaranty, has been before us, in another action between these parties. The declaration, in that case, contained two counts, like those now under consideration. On the trial of the cause under the general issue, the plaintiff having proved the guaranty, the defendant demurred to the evidence, and we held that it did not support the declaration. We thought that the consideration of "*value received*" expressed in the copies of the notes, contained in the guaranty, might, on the authority of the case of *Leonard v. Vredenburg*, [ 8 J. R. 29, ] be held to be the consideration for the guaranty itself, but that it did not appear to be the same consideration alluded to in the declaration ; and we also held, that the plaintiff

might shew, by parol proof, that the notes of *Scovell*, and the guaranty of the defendant, were, in truth, one original transaction, and were both entered into upon the same consideration, to wit: the sale of the goods, &c. by the plaintiff to *Scovell*.

Applying the principles of that decision to the present case, I think that the plaintiff, to support his 1st and 2d counts, ought to show, in pleading, what, in that case, we held him bound to show in evidence. After setting out the written promise of the defendant, he should have averred, in substance, that the *consideration* of the promise, was, the sale of the goods, &c. to *Scovell*, and that the defendant's guaranty, and the notes of *Scovell* were made at the same time, and constituted parts of the same agreement, in pursuance of which, the plaintiff parted with his property, and that averment he might support, on the trial, by parol proof.

The replications to the first and second pleas of the defendant, do not, therefore, in my judgment, support the first and second counts in the plaintiff's declaration, and there must be judgment for the defendant on the demurrer to these replications.

The third count of the declaration states, that *Scovell*, on the 5th of December, 1827, made three promissory notes to the plaintiff, (setting them forth particularly,) and that the defendant, "*in consideration of value received by the said Scovell, and him, the defendant,*" promised the plaintiff to guaranty the payment of the notes, with the necessary averments as to the breach of the guaranty. The fourth count states, that in consideration of value received "*by Scovell and the defendant,*" for which *Scovell* made his promissory note to the plaintiff, (setting it forth,) the defendant promised to guaranty the payment of the note to the plaintiff. To these counts there are the same pleas, replications, and demurrers, as to the two first counts.

The third and fourth counts are substantially the same. The replications set forth a written promise of the defendant, signed by him, containing copies of the notes, to which the guaranty applies, and in which the notes are expressed to be for "*value received.*" In the case of *Leonard v. Vredenburg*, the guaranty of the defendant was in the same form with that in the present

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case. A note expressed to be for "*value received*," was first signed by Johnson, and underneath was written the guaranty of *Fredenburgh*, which contained no new or other consideration. In that case, the court say, that "Johnson's note given for value received, and, of course, imputing a consideration on its face, *was all the consideration requisite to be shown*;" and the Chief Justice adds, "if it was all one transaction, the value received was evidence of a consideration, embracing both the promises: the writing imputed, upon the face of it, one original and entire transaction for a guaranty of a contract, and implies *ex vi termini*, that it was a concurrent act, and part of the original agreement."

It is supposed by the plaintiff's counsel, that the present case falls within the principles here laid down. I am inclined to think that it does not. The guaranty here, after setting forth copies of the notes, goes on to say, that *in pursuance of the understanding and agreement* between the plaintiff and Scovell, the defendant stipulates to pay the notes, if S. does not. The guaranty, in terms, refers to some consideration arising out of the agreement between S. and the defendant, and excludes the inference, (which, perhaps, might otherwise be drawn,) that the value received, expressed in the copies of the notes, was the consideration on which the defendant's contract actually rested. If this be so, then the replications do not support the averments in the third and fourth counts of the declaration. The consideration of the contract declared on, is that of value received by the defendant and Scovell. The contract set forth in the replication does not appear, with sufficient certainty, to rest on the same consideration, and the replication must be considered bad for that reason.

*Judgment for the defendant on the demurrers, with leave to the plaintiff to amend his replications, on payment of costs.*

[H. and E. Wilkes, Att'ys for the plff. E. Anthon, Att'y for the def't.]

## NEW-YORK MAYOR'S COURT, JULY TERM, 1819.

DAVID HAZUL

*versus*

DAVID DUNHAM, JAMES D. WALLACE, AND DAVID R. DUNHAM.\*

*Opinion of Peter A. Jay, Esq. Recorder.***MOTION for a new trial.**

This is an action against the defendants, who are auctioneers and commission merchants, for having sold four bales of cotton bagging, belonging to the plaintiffs, for a price less than that limited by his orders.

At the trial, William Todd was produced as a witness for the plaintiff. Being examined on his *voir dire* he testified, that he was the agent of the plaintiff in relation to the cotton bagging, and had received no instructions as to the mode of selling it, or the price to be asked for it: that the plaintiff had entire confidence in him, and submitted every thing, as to the time and manner of disposing of it to his judgment: and, that he was not interested in the suit. He was objected to, as incompetent, but admitted. Being sworn in chief, he further testified, that in October, 1817, he delivered to the defendants, to be sold, five bales of cotton bagging, belonging to the plaintiff; that on the 8th of May, 1818, he gave them written instructions, by which they were forbidden to sell four of the bales under the cost-price, or fifteen cents per yard; that the defendants, three days after, sold them at auction; that he was informed of the time and place of the sale, but did not attend.

It was then proved by the defendants, that the bagging was sold at auction, to a Mr. Hinton, part for seven and part for six cents a yard; that it was of inferior quality, and that no more

\* This is the opinion referred to, [*ante* p. 150.] in a note to the case of *Wolfe v. Lyster*.

could be got for it at auction, and by wholesale: but that it was afterwards retailed by Hinton, at from nine to twelve cents a yard.

It was objected by the defendants' counsel, that the order to sell at auction for not less than a certain price, was illegal, and, therefore, that the action could not be sustained. But the court charged the jury, to find for the plaintiff the value of the four bales, at the best price which could have been obtained for them had they been sold in the most advantageous manner, and to allow the defendants no commissions on the sales. They accordingly found for the plaintiff \$160.51, being at the rate of about nine cents a yard.

A motion is now made for a new trial, and the defendants' counsel have made three points. 1st. That William Todd was an incompetent witness. 2d. That the instructions given to the defendants were illegal. 3d. That the defendants were entitled to commission.

It is evident that the last point is a corollary to the second, and must receive the same decision. If the defendants had a right to sell without regarding their instructions, they were entitled to commissions; but if they violated their duty to their employer, then they can claim from him no compensation for doing so.

As to the admission of Todd's testimony, it is argued, that as a general agent, he could not sell at auction; that for having done so, an action lies against him by his principal, and that he has, therefore, an interest in this suit. Supposing that he had no right to sell at auction, (which is far from being clear,) yet I think that the plaintiff, by bringing this action, has ratified Todd's acts, and barred himself from suing him for that cause. It therefore appears to me, that he was properly admitted.

The principal point in the cause, and that which has been most laboured, is the second: viz. that it is unlawful to limit the price of an article sold at auction. To support this proposition, the case of *Bezwell v. Christie*, [Couper, 395,] is relied on. In that case, the property of a person deceased had been advertised for sale at auction; and the printed conditions of sale declared, that every article should be struck off to the highest bidder. Bex-

well-sent a horse to be sold at that auction, and under these conditions of sale, but directed Christie, the auctioneer, not to let him be struck off for less than a certain sum. Christie struck the horse off to the highest bidder, for a less sum, and for this, Maxwell brought an action. Lord Mansfield supposing, that in this case, the orders of the owner could only have been complied with, by employing some one to bid on his behalf, proceeded to consider the propriety of that practice, and, thinking it immoral, held, that the action could not be sustained.

There is no other case so strong as this. It is subsequent to our revolution : and the reasoning employed in it has been doubted since in the English courts. But even in this case, it was acknowledged by Lord Mansfield himself, that the owner might, in certain cases, lawfully bid at an auction, and that an article might lawfully be set up at an auction, at a price under which it was not to be sold. Now, in the present instance, the defendants had received no instructions with respect to the manner in which the goods were to be set up : and it must be admitted, that if they could lawfully obey their instructions, they were bound to do so. If, when the four bales were set up, the auctioneer had given notice, that they were not to be sold unless fifteen cents a yard were bid for them, can it be imagined that this would have been a fraudulent transaction ? And if a proclamation to that effect was necessary to render the transaction legal, then it was the duty of the defendants to make it. They were simply directed to sell at auction for not less than a certain price ; the manner of doing so was left to their own discretion, and if they published conditions of sale, making it necessary to sell for less, they violated their duty. In this view of the case, an examination of the authorities might be dispensed with. But it may not be useless to examine with some attention the doctrine contended for by the defendants, and countenanced by several decisions.

Human laws are, and necessarily must be, imperfect. It is impossible for them to control every word and action, and it is, perhaps, fortunate that they cannot. They do not attempt to enforce what are termed virtues of imperfect obligation. As

much as they respect truth; they take no cognizance of its transgression in an almost infinite number of instances. Perfect rectitude is not their object: they neither suppose men angels, nor require them to act as if they were such. Public utility is their end, and this they best consult by interfering only upon necessary occasions. It is, in general, more useful to draw the line between what is lawful and unlawful, so plain and distinct, as to be obvious to all men, than through an excessive anxiety to render it the precise boundary between right and wrong, to make it indistinct and doubtful. Certainty is deservedly a favorite with the law.

Proceeding upon these principles, the common law does not profess to relieve in every case of imposition. It requires the exercise of ordinary prudence, and refuses its aid to such as will not exert it. To those, who ask for relief against the consequences of their own sloth and supineness, it answers, *vigilantibus et non dormientibus subveniet lex*. To the purchaser, who complains that he has been deceived in points, where the use of his own senses would have been sufficient to guard him from fraud, the law replies, *caveat emptor*. If a man, in the full possession of his faculties, will not take the trouble to examine and inquire for himself, he must submit to the consequences, not because it is consistent with morality to take an unfair advantage of the sloth or folly of another, but because it is not necessary, nor would it be useful, for the law to act as tutor and guardian for men, who are capable of taking care of themselves. It is for the same reason, that gross disparity between the price and the value of an article sold, is not of itself a sufficient reason to vacate a contract of sale, even in a court of equity; nor will those vague and exaggerated praises which vendors are accustomed to bestow upon their wares, though ever so undeserved, authorize the vendee to annul his bargain. But if a fact, such as might have influence with a prudent man, and such as cannot be easily ascertained, be falsely asserted, the party deceived may ask for redress. It is on this ground, I apprehend, that the practice of employing puffers at auctions has been condemned, and made a ground for relief in various cases. For it is plain that a person may be intentionally



deceived as the fact, though the falsehood is not asserted in words. If at an auction a number of persons are seen bidding, even a prudent man may be influenced by that circumstance; it will lead him to believe that the article for sale is in demand and the judgment thus expressed by others of its value, may have an effect on the estimate which he forms of it. If then, it should prove that these bidders are all employed by the owner of the article, and bid only in appearance, and not in reality, a falsehood is asserted, which a bystander has no means to detect, and a fraud is practised upon him.

In the year 1786, the House of Lords decided in the case of *Walker v. Nightingale*, [4 Bro. P. C. 198,] that a person, who had been employed as a puffer, could not recover compensation for his services, since they were contrary to good faith.

In 1776, was decided the case of *Bearell v. Christie*, [Cooper, 396,] which turned on the same principle; for Lord Mansfield there took it for granted, that the directions of the plaintiff could only be complied with, by the employment of a puffer.

In 1796, in *Howard v. Castle*, [6 T. R. 642,] the same doctrine is sanctioned. There a sale was held void, it appearing that all the bidders, except the purchaser, were puffers.

In *Conolly v. Parsons*, in 1797, [3 Vesey, 625,] the Lord Chancellor expressed doubts as to this doctrine, in the extent to which it had been carried; and in 1798, in *Bramley v. Allt*, [3 Vesey, 622,] the doctrine received a limitation, that a sale should not be vacated, merely because a puffer had been employed, if there were real bidders, who bid after the puffer had ceased to bid.

In 1806, in *Smith v. Clarke*, [12 Vesey, 477,] a specific performance was decreed against a vendee, although the person, who bid immediately before him was employed by the vendors, to prevent a sale under a given price; so that the doctrine received a new modification, certainly inconsistent with the opinion expressed in *Bearell v. Christie*: it being now admitted, that where no fraud was intended, but a person was employed merely to prevent a sale beneath a fixed price, the transaction should not be considered fraudulent. Thus it appears that the rigid doctrine, first

sanctioned in *Berwell v. Christie*, has been gradually softened, and made more conformable to the common notions and habits of mankind.

I shall not discuss the abstract morality of employing bidders on behalf of the owners of goods, but I think it is evident, that a mere limitation of the price of an article, to be sold at auction, is not, of itself, illegal. It is true, that for the purpose of making it bring that price, unworthy and unlawful artifices may be resorted to; but in the present case, no such artifices were contrived, or directed, by the plaintiff or his agent. He merely prohibited the auctioneer from selling for less than so much: if nobody bid so much, the auctioneer might have stopped the sale. At all events, if the instructions could in any way be lawfully complied with, (and it is admitted even in *Berwell & Christie*, that they might) then the auctioneer was bound by them.

After viewing this case in every light, I remain of opinion, that the verdict is right. The motion for setting it aside, is therefore denied, with costs.

### ADVERTISEMENT.

THE Editor has in his possession more than three hundred cases besides those contained in this volume, many of which, he thinks, cannot fail to be interesting to the profession. Several of them relate, in an especial manner, to the law of Marine and Fire Insurance, as well as to the Commercial Law in general. In the city of New-York, cases of importance, both in principle and amount, are constantly arising among its active and enterprising population; and should the success of the present volume in any degree warrant the undertaking, it will be followed, in a short time, by another. If the expense of publication can be defrayed by the sale, the Editor will feel perfectly satisfied, as he has not undertaken this task under any expectations of emolument or hope of pecuniary reward.

## MEMORANDUM.

THE editor and publisher have been at pains to cause the printing of this volume to be correctly done; but in spite of all precautions, many inaccuracies have crept in. A few of them are noted below, and many more will undoubtedly be observed by the reader. It is hoped, however, that the errors are not of such a nature as to produce misapprehension, or materially alter the sense of the passages in which they may be found.

## ERRATA.

- On page 1, (line 10 from the bottom,) for 1793, read 1798.
- On page 60, (the 9th line from the bottom,) for *principal*, read *principle*.
- On page 84, for *drawers*, (line 16,) read *drawees*.
- On page 84, for *consignee*, (line 2,) read *consignor*.
- On page 145, (note,) for 1 *Wm.*, read 1 *Wend. R.* 91.
- On page 148, (line 6,) for *account*, read *count*.
- On page 310, (line 1,) for *various*, read *versus*.
- On page 393, (note,) for *Hoffman and Palmer*, read *Hoffman and Tulman*.
- On page 300, (line 2,) for *indebetatis*, read *indebitatus*.
- On page 390, for *Mulock*, read *F. A. Vulture*, attorney for defendant.
- On page 498, (line 1,) for *inadmissible*, read *admissible*.
- On page 552, (line 5,) strike out the words at the end of C. J. Jones' opinion, "*on the payment of costs;*" payment of costs was not, I find, made a condition of the new trial.
- On page 578, for *Foot and Kent*, read *J. Day*, attorney for S. & M. Allen.

AN  
INDEX

OF THE  
PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

ABANDONMENT.

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ABATEMENT.

1. In a suit against two defendants, founded upon a joint cause of action against both, one of the defendants cannot defeat the action by pleading in *abatement*, matters which are applicable to himself alone. To make a plea in abatement effectual in such a case, *all* the defendants must unite in the plea, and it cannot be interposed by one alone.

*De Forest v. Jewett and Parsons*, 137

which had been issued against himself alone. Upon *demurrer* to this plea, it was held to be bad, the cause of action not being covered by the plea. *Id.*

See PRACTICE, 12.

ACCOUNTS.

See REFERRES, 1, 2, 3.

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See ASSUMPSIT.

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ACTION FOR MONEY HAD AND RECEIVED.

See PARTNERS, 1, 2. ASSUMPSIT, 2.

2. In an action of *assumpsit* against the defendants for money had and received, one appeared by his own attorney and pleaded the general issue; while the other by a separate attorney appeared and pleaded in abatement of the *whole* suit, the pendency of certain foreign attachments in the state of Connecticut,

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1. The plaintiffs sold the defendant a quantity of timber, and having presented their account for the same to the defendant, on the 28th day of May, 1828, at 5 o'clock, P. M., received his check on the Franklin Bank in the city of N. York. At half past ten, A. M. the next day, the bank was prohibited from making any payments by an injunction out of Chancery, and the check was consequently never presented. In an action by the holders against the drawer of the check, it was held, that the plaintiffs might, under these circumstances, waive the check altogether, and recover the value of the timber in an action of *indebitatus assumpsit*. *Cromwell and Wing v. Lovett*, p. 56.

2. A better, who has deposited money in the hands of a stake-holder, upon the event of a trotting match, cannot recover it back, by an action of *indebitatus assumpsit*. The transaction being illegal, no action can be sustained, by the common law, for any cause growing out of it. *McKeon v. Caherty*, 309

3. But, by the 5th section of the act to prevent horse racing, (1 R. L. p. 222.) any person who has paid money upon the event of a race, may recover the same, "in like manner as is provided" in the second and third sections of

"the act to prevent excessive and deceitful gaming." (1 R. L. 153.) By the second section of this act, any person losing at any game any sum above \$25, and paying the same, may at any time, *within three months*, recover it back of the winner by an action of *debt*, founded on the act. As the remedy afforded to the loser is provided by statute, in pursuing that remedy, the forms and limitations prescribed, must be observed; and a general action of *assumpsit* will not lie. *Id.*

judgment was to be entered up, for the amount, together with costs, to be taxed, including the expense of the reference. Upon a motion by the defendants, to set aside the award of these referees or arbitrators, upon the ground principally, that certain evidence offered by them, at the trial, was rejected, it was *held*, that the parties were precluded, by the terms of their submission, from questioning the award, there being no stipulation for a review. *Lowndes v. Campbell*, 599

See ABATEMENT, 2. PARTNERS, 7.

### AUCTIONEER.

It is not unlawful to place goods in the hands of an auctioneer for sale, with directions that he should not part with or dispose of them, unless they produce a particular sum; the restriction not being considered as an unlawful means of enhancing the price of the goods, or an imposition upon fair purchasers. *Wolfe v. Luyster*, 146

### AUTHORITY.

See PROMISSORY NOTES, 7, 8.

### AVERAGE.

See INSURANCE, 27, 28.

### AWARD.

1. The parties to a suit in this court, and to another also, in the Supreme Court, for the purpose of bringing the matters in controversy to a speedy decision, and save costs, referred the same to disinterested persons, of their own selection, for a decision, under a stipulation, that if the issue was found in favour of the defendant, the said several suits were to be discontinued; but if in favour of the plaintiff, that then a *relicta* for a given sum, should be delivered to the real party in interest, on which a

2. The award was for less than \$250; but as the action was brought for the penalty of the bond, which exceeded that sum, the plaintiff taxed his costs according to the rules of the Supreme Court. But it was *held*, that as the plaintiff had agreed to accept a *relicta* for less than \$250, waiving a judgment for the penalty, (which otherwise would govern costs,) he was entitled to Common Pleas costs only. *Id.*

See REFEREES, 1.

### B

#### BAIL:

1. There is no distinction between proceedings against bail and other joint debtors, and the plaintiff may proceed and declare against both, under the statute, as in ordinary cases, where one defendant is taken, and the other not found. *Steward v. Patten & Cutter*, 39

2. In an action upon a recognizance, the sheriff returned upon the writ, "one of the defendants taken, and the other not found." The plaintiff, under the statute relating to joint debtors, having declared against both bail, a motion was made in the name of the defendant not taken, for an *exoneretur* upon the bail-piece in the original suit, with the avowed object of making it available to both: but the motion was *denied*. *Id.*

3. The right of the bail to discharge himself by a surrender of his principal ends, with the return of the *ca. sa.* in the original suit; and the eight days are allowed as matter of *grace*, rather than right. *Id.*

See PRACTICE, 9, 14. RESCUE, 1.

### BALANCE STRUCK.

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### BANK NOTES.

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See ASSUMPSIT, 2, 3.

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PROMISSORY NOTES.

### BILL OF PARTICULARS.

A party giving a bill of particulars under a Judge's order, is not held thereby to furnish evidence against himself; but is merely confined at the trial to the range of proof which he himself has chosen. And where referees allowed the plaintiff to resort to the particulars of the defendant's set-off, to establish a fact, the evidence was held to have been improperly admitted. *Brittingham v. Stevens*, 379

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### CHARTERER.

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### CHARTER PARTY.

See PARTNERS, 5, 6, 7. LIEN, 1, 2.

### CHECK.

1. A check upon a bank, given in the ordinary course of business, is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means whereby the holder may procure the money. *Cromwell & Wing v. Lovell*, 56
2. The holder of a check, in such a case, becomes the *agent* of the drawer to collect the money; and if guilty of no negligence, whereby an actual injury is sustained by the drawer, he will not be answerable, if from any peculiar circumstances attending the *Bank*, the check is not paid. *Id.*
3. In a suit against the drawer for the consideration of such a check, the holder may treat it as a nullity and resort to his ORIGINAL CAUSE OF ACTION. *Id.*
4. If the maker of a check has no funds in the bank upon which it is drawn at the date of the check, it is not necessary for the holder to present such check at bank for payment, in order to enable him to sustain an action upon it against the maker. *Franklin & Smith v. Vanderpool*, 78



5. The drawing of a check under such circumstances is, when unexplained, a fraud which deprives the maker of all right to require presentment and demand of payment. *Id.*
2. Where a person undertakes to enter into a contract with a corporation, in their corporate name, and accepts an official appointment under them, he thereby admits them to be duly constituted a body politic and corporate under such name; and cannot afterwards, set up, by way of defence, that no such corporation ever existed, but is concluded by his admission. *Id.*

### COMMISSION MERCHANT.

A commission merchant, is to all intents the owner of the goods in his possession, as to all the world except his principal, and has a right to insure them to their full value in his own name. *De Forest v. The Fulton Ins. Company,* 84

See INSURANCE.

### CONSIDERATION.

See GUARANTY, 1, 2. PLEADING, 4. PARTNERS, 10, 11. PROMISSORY NOTES, 1, 3, 5, 11, 12. USURY, 2.

### CONTRACT.

A contract for the benefit of a third person made without his knowledge or authority, is a binding contract on the promiser; and if subsequently adopted by him for whose benefit it was made, it may be enforced by him. *Bridge v. The Niagara Ins. Co.,* 247

See INSURANCE, 16. USAGE, 2.

### CONSTRUCTION.

See WILL.

### CORPORATION.

1. Where there has been a body corporate *de facto* for a considerable period of time, claiming at least to be such, and holding and enjoying property as a corporation, it will be presumed that every mere formal requisite to the due creation of the corporation has been complied with. *All Saints Church v. Lovett,* 191

3. Where the trustees of a religious incorporation bring a suit, *colore officii*, the defendant cannot object to their right of recovery, upon the ground that they are not trustees, without shewing that proceedings have been instituted against them by the government, and carried on to a judgment of *ouster*. *Id.*

4. Being trustees *de facto*, all their proceedings are valid, until they are ousted by a judgment at the suit of the people, and no advantage can be taken of any *non-user* or *mis-user* on the part of the corporation, by any defendant, in any collateral action. *Id.*

5. What shall be considered as notice to a corporation is not settled; but under some circumstances, it seems that notice to a director ought to charge the corporation; as where the director acts as the agent of the corporation. *Fulton Bank v. Benedict,* 480

See USURY, 1, 2, 3.

### COSTS.

1. Preliminary proofs, in an insurance cause, are not to be taxed in the plaintiff's bill of costs. *Barlow v. The Eagle Fire Ins. Co.,* 153
2. A party cannot charge for *drafting* as many subpoenas as he has witnesses; but must prepare one draft, and from that engross the others. *Id.*

3. In an action against the sheriff for *non-feasance*, wherein he is acquitted, *single costs* only are to be allowed to the officer, on taxing a bill in his favour. *Warner v. Lowndes*, 224

See PARTNERS, 5, 6, 7.

## D

### DEBT.

4. In actions of trespass against an officer and persons acting in his aid, where the defendants appear by the same attorney, but sever in their defence, and are successful, the officer is entitled to *double costs*, and each of the lay-defendants, to *single costs*, for all items not allowed to the officer. *Lawrence v. Titus, et al.*, 421

See AWARD, 2. PRACTICE, 8, 9, 11.

### COVENANT.

1. In assigning breaches in an action of covenant, it is sufficient, in general, to follow and negative the words declared upon. *McGeehan v. M'Laughlin*, 33
2. Where the words of a lease provided that the lessee should pay "*for all necessary repairs put upon the premises*" during the term, and in declaring upon it, the breach assigned was, that the lessee "*did not, nor would*" "*during the said demise, and whilst she was possessed of the*" "*premises,*" "*pay,*" "*or cause to be paid to the plaintiff*" "*the repairs that*" "*were necessary,*" "*and were made upon the*" "*premises by the*" "*plaintiff;*" it was held to be well assigned; and a demurrer to the declaration was overruled. *Id.*
3. The general rule is, that the breach will be sufficiently assigned, by negating the words of the covenant; and the exception is of cases where such general assignment does not necessarily amount to an averment of a breach of the covenant; but further averments are necessary, to show that the covenant has been broken; and in these cases, the breach must be specially assigned. *Id.* 35

1. The defendant, on the 3d of January, 1815, executed a bond for \$8,500 in favour of the plaintiffs, to secure the payment of \$4,404 52. The condition of the bond recited, that to pay and satisfy the last mentioned sum, one John C. Hamilton had, by indenture, granted unto the plaintiffs an undivided interest in certain lands, (which had been conveyed by Timothy Pickering to John B. Church and others in trust,) which were unproductive, and could not be divided for several years thereafter. The condition further stipulated, that the defendant should pay to the plaintiffs, year by year, the sum of \$308 21, the lawful interest on said sum of \$4,404 52, until the said estate should be divided, and a clear and perfect title thereto, made to the plaintiffs.
- In an action upon the bond to recover the amount of the annual payments, from the year 1818 to 1828, the defendant contended, I. That the plaintiffs were bound to show diligence in procuring a partition of the lands conveyed. II. That they were barred, by the statute of limitations, from recovering any thing in arrear beyond six years, or that there was a presumption of payment from lapse of time. *Held*, however, that the statute of limitations did not apply to this case; that there was no presumption of payment, and that the plaintiffs were not bound to procure a partition of the estate. *Held*, also, that the annual payments were to be viewed in the light of interest on the principal sum, and that the plaintiffs were not entitled to interest upon the annual payments. *Henderson & Cairnes v. Hamilton*, 314
2. An action of *debt*, for the recovery of rent founded on a lease, will lie in fu-

your of the lessor, notwithstanding the lease may have expired. *Norton & Norton v. Vultee*, 384

3. The assignee of a lease, who enters upon and occupies the demised premises, is liable for the rent in like manner with the assignor. In declaring against him, he may be described as assignee in general terms; and the manner in which the assignment was made, need not be set forth. But the assignee cannot be made answerable, by the action of *debt*, for the rent of any part of the premises demised, except that which has been possessed and enjoyed by himself; and the rent in such cases may be apportioned, the action being founded on the *privity of estate* merely, and not on the *privity of contract*. *Id.*

4. The plaintiffs demised certain premises, for a term of years, to one F. L. Vultee. The lessee, a short time before the expiration of the term, died, and the defendant (his widow) took out letters of administration upon his estate, and continued in possession of a part of the premises, until the lease expired. An action of *debt* being brought against her for all the rent which was in arrear at the time of the expiration of the lease, it was held, that she was only liable in this action for the rent of such parts of the premises as had been occupied by her after her husband's death. *Id.*

See JUDGMENT. ASSUMPSIT, 3.

DISCHARGE.

#### DECLARATION.

See PLEADING, 2, 3. LANDLORD, 2.

SLANDER, 1, 2.

#### DEED.

See PARTNERS, 5, 6, 7. PLEADING, 5.

#### DEFENDANT.

A defendant cannot move for judgment "non obstante veredicto." *Phoenix & Whitney v. Stagg*, 635

#### DEMURRER.

See ABATEMENT, 2. GUARANTY, 2. JUDGMENT, 3. LANDLORD, 2. PARTNERS, 10. PLEADING, 1, 2, 4, 6. PRACTICE, 11.

#### DEMURRER TO EVIDENCE.

1. Upon a demurrer to evidence, any fact which a jury would infer from it, is admitted. *Wheelwright v. Moore*, 201.
2. When there is a demurrer to evidence which is certain, as in the case of documentary proof, the practice is for the court to give final judgment, as on a special verdict; but where there is no certainty in the statement of facts proved, the court may award a *venire de novo*. *Id.*

See PLEADING, 4.

#### DEVIATION,

See LIEN, 1, 2.

#### DIRECTORS OF A BANK,

See PROMISSORY NOTES, 1, 2.

#### DISCHARGE.

To an action of debt, on judgment, the defendant pleaded a discharge under the act to abolish imprisonment for debt. The plaintiffs replied, that, on the day appointed for the appearance of the creditor to show cause against the discharge, a certain creditor appeared to oppose the application, when the defendant, to induce said creditor to withdraw his opposition, secured to him the payment of one half of his debt; whereby the plaintiffs withdrew their

opposition, and the defendant obtained his discharge. Issue was taken on the replication, and a verdict found for the *plaintiffs*. The defendant then moved in "arrest of judgment" or for "some order directing an entry on the record, qualifying the judgment, so that no execution should issue against his person." *Held*, that the facts stated in the replication, (though found to be true,) were not so pleaded as to avoid the discharge; and that the judgment, although it could not be arrested must be so modified as to prevent the execution from issuing against the defendant's person. *Phoenix & Whitney v. Staggs*, 635

#### DISCHARGE UNDER THE ACT.

See PRACTICE, 4.

#### DISCONTINUANCE.

See PRACTICE, 4.

#### DOLLARS.

See INSURANCE, 23.

#### DUPLICITY.

See PLEADING, 1, 2.

#### E

#### ENDORSEMENT, ENDORSER.

See PROMISSORY NOTES, 1, 2, 7, 8, 9, 10, 11.

#### EQUITY.

See PARTNERS, 1, 9, 10, 11.

#### EVIDENCE.

See BILL OF PARTICULARS. CORPORATION. DEMURRER TO EVIDENCE. GUARANTY. 1, 2. INSURANCE, 29. PLEADING, 4. PARTNERS, 6. PROMISSORY NOTES, 4. RESCUE, 1. SLANDER, 1, 2, 3, 4. SHERIFF, 1. USAGE, 2.

#### EXECUTION.

See SHERIFF, 1, 2, 3. DISCHARGE.

#### F

#### FEEs.

See PLEADING, 6.

#### FORCIBLE ENTRY AND DETAINER.

1. In an indictment under the act to prevent forcible entry and detainer, [1 R. L. 96,] the defendant may be convicted of forcible detainer only. *The People v. Godfrey*, 240
2. In a prosecution of this nature, the title to the premises, as between the defendant and the *relator*, cannot be inquired into, although the latter is bound to set forth his title, so far as to show himself to be within the provisions of the act. That title may be controverted by the defendant; but he cannot set up his own, as a substantive matter of defence: because the question of title cannot be tried in this action. *Id.*

#### FOREIGN JUDGMENT.

See JUDGMENT.

#### FORFEITURE.

See SEAMEN.

#### FRAUDULENT CONVEYANCE.

See SHERIFF, 5.

#### FRAUD.

See PROMISSORY NOTES, 2, 3, 11. SHERIFF, 5.

#### FRAUDS, STATUTE OF.

See PROMISSORY NOTES, 8. GUARANTY. PLEADING, 4.

**FREIGHT.**

*See* INSURANCE, 19, 20, 29, 30. LIEN, 1, 2.

**G**

**GAMBLING.**

*See* ASSUMPSIT, 2, 3.

**GENERAL ISSUE.**

*See* PRACTICE, 2. USAGE, 3.

**GUARDIAN AD LITEM.**

*See* INFANT.

**GUARANTY.**

1. In an action upon a guaranty, where the defendant, relying upon the statute of frauds, pleads, that "the promise mentioned in the declaration, is a "special promise to answer for the "debt of a third person, and that no "note or memorandum in writing, "showing the consideration of such "promise, was ever signed by him," the plaintiff, if the consideration of the guaranty was the sale of goods to a third person, made at the same time with the guaranty, must set forth by his replication, what he would be bound to show in evidence, if the statute were not pleaded. It must appear by the replication, that the sale of the goods, and the making of the guaranty, were simultaneous acts, constituting parts of one and the same agreement. *Wheelwright v. Moore*, 648

2. The third and fourth counts of the plaintiff's declaration set forth, that one S. made certain promissory notes to the plaintiff, the payment of which, the defendant guaranteed, "in consideration of value received by S. and the "defendant." The defendant having pleaded the statute, the plaintiff re-

plied, setting forth a written promise of the defendant, containing copies of the notes which were expressed to be "for "value received." The guaranty also set forth, "that in pursuance of the "understanding" between the plaintiff and S., the defendant stipulated to pay the notes, if S. did not. *Held*, that the replication did not support the averments in the declaration; the contract there set forth, not appearing with sufficient certainty, to rest on the same consideration. *Id.*

**H**

**HORSE RACING.**

*See* ASSUMPSIT, 2, 3.

**I**

**ILLEGALITY OF CONSIDERATION.**

*See* PROMISSORY NOTES, 1. USURY, 2.

**INDICTMENT.**

*See* FORCIBLE ENTRY AND DETAINER, 1.

**INFANT.**

1. If an infant who is arrested does not appear to the action, nor take any notice of his arrest; upon motion of the plaintiff, and on notice to the infant, the court will appoint a guardian, *ad litem*, for him in order to prevent the proceedings from being afterwards set aside. *Fearing v. Clawson*, 55

**INJUNCTION.**

*See* ASSUMPSIT, 1.

It seems, that an injunction out of Chancery under the act "to prevent fraudulent bankruptcies by incorporated companies," prohibiting a bank from

making any payments whatever, and arresting all its operations will excuse the holder of a bank check, who has received it from another person in the course of their dealings from presenting it at the bank for payment. *Cromwell & Wing v. Lovell*, 56

### INDIGO.

See USAGE, 3.

### INSIMUL COMPUTASSENT.

See CHECK, 1.

### INSOLVENT.

See DISCHARGE,

### INSURANCE.

1. A building erected upon leasehold premises, being insured against fire to the amount of \$800, was destroyed by that element, about a fortnight before the expiration of the lease. By the terms of the lease, the lessee had the option of renewing it, or removing his building at the end of the term. The building if suffered to remain was worth about \$1000, but if removed not more than \$200, and at the time of the fire the lessee had given no notice of any intention to renew the lease. *Held* nevertheless, that the plaintiff was entitled to recover the full amount of his insurance; as it did not exceed the value of his building. *Laurent v. The Chatham Fire Ins. Co.*, 41
2. The sum insured, is the extent of the insurer's liability, not the measure of the assured's claim; and the assured has no right to the specific sum mentioned in the policy as liquidated damages, in case of a total loss. *Id.*
3. A policy of insurance against fire is a contract of indemnity; it is an open policy upon interest, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled. *Id.*
4. In the principal case, the intrinsic value of the building, at the time of the fire, was the measure of the loss within the meaning of the contract, and is the standard by which the indemnity is to be adjusted. *Id.*
5. A commission merchant, having the goods of his principal or consignor in his possession, deposited with him for sale, has an interest in the property which entitles him to insure the same against fire, in his own name, to the full value of the goods. *De Forest v. The Fulton Fire Ins. Co.*, - 84
6. In declaring upon such a policy, the pleader may set forth the facts as to the ownership, according to the truth of the case, and conclude, "to the damage of the plaintiff." *Id.*
7. A commission merchant is to all intents, the owner of the goods in his possession, as to all the world, except his principal. *Id.*
8. An insurance effected by a commission merchant upon goods, "as well the property of the assured, as held by them in trust, or on commission," covers the whole value of the property, and not the mere interest of the party effecting the insurance. *Id.*
9. At the trial of this cause, the plaintiffs were permitted to prove, that it was the usage of commission merchants in the city of New-York, to effect insurance on goods consigned to them for sale or commission, without express orders from their consignors; and it was held that the proof of such usage was rightly admitted. *I.*

10. An insurable interest, in mercantile language, does not necessarily import an absolute right of property in the thing insured. A special or qualified interest is equally the subject of insurance; and each distinct interest in the same subject may be protected by a separate policy on the subject, for the party interested in it. *Id.*
11. Insurance upon goods outward, and upon their proceeds home, will not cover the same goods on their return voyage. *Dow v. The Hope Ins. Co.* 166
12. Insurance was effected upon goods from New-York to Batavia, and upon the proceeds thereof home: the goods valued at the sum insured out; "to be open on the proceeds home." The identical goods shipped to Batavia, were returned to New-York in the same vessel, and damaged upon their return voyage: held, that they were not protected by the policy during the voyage homeward. *Id.*
13. A policy of insurance, being a contract of indemnity, must receive such a construction of the words employed in it, as will make the protection it affords co-extensive, if possible, with the risks of the assured. But a just regard must also be paid to the language used by the parties, and no strained or unnatural sense must be ascribed to it, (unless from necessity,) to the prejudice of either party. *Id.*
14. Where the insurance is on the proceeds or returns of an outward cargo, the words must receive a liberal construction; and it is not necessary that the return cargo should be procured by an actual sale of the outward cargo, and an appropriation of the money arising from it. It is sufficient that the homeward cargo should be a substitute for the outward, and should spring, though indirectly, from the disposal of the latter either by sale or deposit. *Id.*
15. The keeping of oil and spirituous liquors by a grocer in his store, for the purposes of ordinary retail, "and in quantities not unusually large," is not a "storing" of them, within the meaning of that clause of the policies of insurance against fire, commonly used in the city of New-York, which prohibits the appropriation of the building insured, for the purpose of "storing therein" any goods denominated hazardous or extra-hazardous, in the memorandum of special rates annexed to the policies. *Langdon v. The N. Y. Equitable Ins. Co.,* 226
16. A contract for the benefit of a third person, made without his knowledge or authority, is a binding contract on the promiser; and if subsequently adopted by him for whose benefit it was made, it may be enforced by him. *Bridge v. The Niagara Ins. Co.,* 247
17. The plaintiff was a general agent for a merchant residing at Carthage, who was in the practice of making shipments to New-York. On the 19th of February, 1827, the plaintiff, without any orders from his principal, caused an open policy of insurance for \$5000, on goods laden, or to be laden, on board any vessel from Carthage to New-York, on account of his principal, to be executed by the defendants, who received the premium. On the 17th of February, the agent wrote to his principal, informing him of his intention to effect said policy, and on the 23d of March following, the principal replied to his letter, and conditionally affirmed his act. On the 21st of February, (two days after the policy was effected,) a loss occurred by the perils insured against, on goods shipped by the principal on board the brig Mary, from Carthage to New-York. Held,

- that these goods were covered and protected by the policy: that the defendants, having contracted with the agent for the express benefit of the principal, and having received the premium, could not be permitted to show any want of authority in the agent, and that the principal, having adopted the acts of the agent, could enforce the contract in the name of the agent. *Id.*
18. Where the loss is a partial one, and the preliminary proofs are so defective, that the assurers cannot make up the amount of the loss from the proofs before them, the court will not allow the assured interest upon the amount of his loss. *Id.* Note at the end of the case.
19. The charterer of a ship has no interest in the freight *as such*, and he cannot, therefore, insure it *eo nomine*. *Robbins v. The N. York Ins. Co.*, 325
20. It seems, however, that an *advance* of freight money may be insured under the general name of freight; but to enable the charterer to recover the amount of the underwriter, he must prove the fact of the advance. *Id.*
21. All losses and expenses necessarily, prudently, or reasonably incurred in respect to property saved from shipwreck, from the time of the shipwreck, to the time when the property can be directly transported to the place of its ultimate destination, are proper charges upon the property so transported, and are, where the property has been insured, to be borne by the insurers. *Bridge v. The Niagara Ins. Co.* 423
22. Sums paid for transporting the master and crew, and for their support during the same period, while they are guarding and protecting the property, are also to be borne by the insurers. The master and seamen, after becoming separated from the vessel by the shipwreck, are entitled to compensation as *labourers* or *salvors*, for their services in transporting and saving the property, to be allowed according to the nature of the services. *Id.*
23. Where dollars taken by the master and crew from a stranded vessel, carried on shore, and buried in the sand, were afterwards stolen before they could be reclaimed, they were not considered as landed in "good safety," and the loss was held to fall upon the underwriters. But the expenses incurred by the master in searching for the dollars, are to be apportioned on the dollars alone. *Id.*
24. Where the adjustment of a loss is referred to a referee by a stipulation in a case, the referee is to be satisfied as to the character of the charges, in such manner as he may think reasonable; and in case of difficulty, application is to be made to the court for directions. *Id.*
25. If a vessel, during the prosecution of her voyage, be stranded near her port of destination, and, for the purpose of relieving her, the cargo be put into lighters, and forwarded to such port, and during the passage in the lighters, a part of it sustain damage, such loss is a proper subject of general average. *Lewis v. Williams*, 430
26. A vessel on her voyage from New-York to Mobile, having on board goods belonging to the plaintiff and the defendant, was stranded near Mobile Point. While in this situation, all the goods on board were put into lighters by the master, and forwarded to Mobile, with instructions to his agent, not to deliver them to their respective consignees, until the general average was secured. The goods all arrived at Mobile; but on their passage from the vessel to



that place in the lighters, those belonging to the defendant were damaged to an amount exceeding \$2000.

In adjusting the general average at Mobile, the loss on the defendant's goods was taken into the account, and the proportion assessed upon those belonging to the plaintiff amounted to \$86 76. This sum the agent of the captain exacted from the plaintiff's consignee before he would deliver the goods to him, and it was paid accordingly, under that compulsion. The brig was shortly afterwards got off, and proceeded up the bay, but was driven back by a gale of wind, and again stranded, when she was abandoned to the underwriters.

Upon an action brought to recover the amount thus paid by the plaintiff to the defendant, it was held, that this was a proper case for a *general average*; that the loss upon the defendant's goods was correctly taken into the account, in making the adjustment, and that the plaintiff was not entitled to recover. But if this were not so, it seems that the adjustment made at Mobile, would be conclusive, upon the ground, that Mobile, in relation to New-York, is to be considered, upon a question of average, as a foreign port.

*Id.*

27. It is well settled, that the charterer of a vessel cannot insure the amount of his *charter-money*, under the general name of *freight*. The policy itself is the evidence of the contract of insurance, and parol proof cannot be admitted to show that the plaintiff, under the name of freight, intended to insure the profits on his charter-party. *Mellen & Nesmeth v. The National Ins. Co.*, 452

28. In a policy on freight supposed to be valued, the sum insured cannot be assumed as a valuation of the freight,

nor adopted as conclusive evidence of the amount of the charterer's interest. It seems that the true rule by which that interest is to be ascertained, is the actual freight which the vessel did or could earn.

*Id.*

29. Where a chartered vessel is lost by the perils insured against, the charterer's interest in a policy on freight, *eo nomine*, never attaches; and if the premium has been paid, it can be recovered back in an action for money had and received.

*Id.*

See COSTS, 1. REFERENCES, 2, 3. USAGE, 6.

## INSURABLE INTEREST.

See INSURANCE, 10, 19, 27.

## INTEREST.

See INSURANCE, 18, (note at the end of the case.) DEBT, 1, 2. USAGE, 4.

## INTERESTED WITNESS.

See USURY, 5.

## JOINT DEFENDANTS.

See ABATEMENT, 1, 2.

## JUDGMENT.

1. In an action upon a judgment obtained in the courts of another state, it is competent for the defendant to show by a special plea, that the court, in which the judgment was rendered, had no jurisdiction, either of his person or the subject matter. *Harrod v. Barretto et al.*, 155

2. That every presumption is in favour of the court, which rendered the judgment; and the plea must negate, by positive averments, every fact from which that jurisdiction might arise. *Id.*

3. Where, therefore, to an action of debt on a judgment obtained in the "Court of Common Pleas for the County of Suffolk in the Commonwealth of Massachusetts," the defendants pleaded, that at the time of rendering the said judgment, and from the time of the commencement of the action upon which the same was founded, up to the time of its rendition, they "were, and ever since have been inhabitants and residents of the City of New-York" and "never were inhabitants of, or residents in the State of Massachusetts," "nor subject or amenable to the laws" of that State, nor within the jurisdiction of any of its courts; that "the first process was never served upon them," "nor did they or either of them, ever have any notice of said suit;" the plea was held to be bad upon demurrer, because it did not contain a direct and positive averment, that the defendants had not appeared in the suit in which the judgment was obtained. *Id.*

See SHERIFF, 5.

## JUDGMENT NON OBSTANTE

1. VEXEDICTO (16)

See DISCHARGE.

## JURY DE PROPRIETATE PROBANDI.

See SHERIFF, 8.

## JUSTIFICATION.

See SLANDER, 3, 4.

## LANDLORD AND TENANT.

1. An action lies in favour of a landlord, against any person, who so wrongfully and maliciously disturbs his tenants, that they abandon his premises, and the landlord thereby loses his rent. *Aldridge v. Stuyvesant*, 210

2. The declaration set forth that the plaintiff was possessed of the unexpired term of a house, which he demised to certain persons, who entered and were in quiet possession of the same. That the defendant knowing that they rightfully held possession as tenants of the plaintiff, and wrongfully and maliciously intending to injure him, "so disturbed his said tenants," that they were obliged to abandon the premises: whereby the plaintiff lost his rent, and the premises became injured for the want of occupation. Upon demurrer to this declaration, it was held, that the plaintiff was entitled to judgment. *Id.*

## LEASE.

See DEBT, 2, 3, 4. LANDLORD.

## LESSEE.

See INSURANCE, 1.

## LEVY.

See SHERIFF, 2, 3.

## LIEN.

1. The owner of a ship has, by the general rules of law, a lien on the cargo for his freight, although the vessel may be hired to another, provided he continues in the actual, or constructive possession and controul of it. But if he part with his possession to a charterer, the latter is considered as the owner for the

voyage, and the former has no lien for the freight. *Lander v. Clark*, 355

2. By covenant of charter-party the owner of the brig *Holly*, let her to the plaintiff, for a voyage from Boston to the East Coast of South America, and back to Boston. The master of the vessel was to be appointed by the plaintiff; and he stipulated to pay the owner \$600 per month for the hire of the vessel, to pay all port charges and pilotage during the voyage, and to "deliver the "brig" on her return to Boston, to the owner or his order.

The vessel proceeded to Rio Grande, and having delivered her cargo there, took on board another, partly the property of the plaintiff; and partly on freight for New-York. She likewise received the defendant on board at Rio Grande, as master for the homeward voyage. He was directed to proceed to New-York, and there deliver such part of the cargo as was taken on freight for that place, and then await the orders of the plaintiff. Among the articles taken on freight, was a quantity of hides, &c., consigned to one Whitlock of New-York.

Before the arrival of the vessel at New-York, the charterer became insolvent, and immediately on her arrival, the owner took possession. Whitlock paid the freight of the property consigned to him, to the defendant; and he, with full knowledge of the charter-party, and of the claims of the plaintiff, paid over the money to the owner of the vessel. Held, that the charterer might recover back the freight thus paid over to the owner, in an action of assumpsit against the master, the defendant. Held also, that the deviation of the vessel from the direct route from Rio Grande to Boston, for the purpose of delivering the freight at New-York, could not be considered by the owner such a violation of the charter-party, as would authorize him to treat it as a

nullity, resume the possession of this vessel at New-York, and claim a right of lien, for the freight of the goods found on board. *Id.*

## LIGHTERS.

See INSURANCE, 25, 26.

## LIMITATIONS, STATUTE OF.

See DAMAGES, 1.

## LOAN.

See USURY.

## LOSS.

See INSURANCE, 21, 27.

## M

## MASTER OF A SHIP.

See SEAMEN. INSURANCE, 22, 23.

## MEANING OF WORDS.

See THE CASE OF BENEDICT V. FULTON BANK, 498, 520, and onward.

## MISTAKE.

See PARTNERS, 11.

## MISUSER.

See CORPORATION, 4.

## MONEY HAD AND RECEIVED.

See PARTNERS, 1, 2. INSURANCE, 29.

## N

## NEW TRIAL.

Upon an application for a new trial, on the ground of newly discovered evidence, where such evidence rests in the knowledge of a witness, the court

will require the party moving to produce an affidavit of the witness, setting forth the facts upon which he relies, or to show that it could not be obtained.

*Denn ex dem. Hughes v. Morrell, et al.*,  
282.

### NON-USER.

See CORPORATION, 4.

### NOTICE.

See PRACTICE, 9, 10. PROMISSORY  
NOTE, 6. USURY, 3.

### O

### OFFICER.

See COSTS, 4.

### OFFICERS DE FACTO.

See CORPORATION.

### P

### PAROL PROOF.

See PLEADING, 4. INSURANCE, 27.

### PAROL AUTHORITY.

See PROMISSORY NOTES, 5, 6.

### PARTNERS.

1. An action for money had and received, brought by a partner in a particular transaction, against his co-partner, cannot be sustained, unless there has been a settlement of their joint affairs, and a balance struck, although there may have been a complete termination of the partnership. *Atwater v. Fowler*,  
180

2. Therefore, where A. & F. were jointly interested in a purchase of stock in the old Bank of the United States, and

upon a termination of their speculation, F. wrote to A., enclosed him a copy of his account, exhibiting a balance against A., and informed him, that he (A.) would be entitled to receive thereafter "whatever residue" there might be on 29 shares of said "bank stock," but which residue, consisting of dividends on the shares, was afterwards received by F. himself: it was held, that he was not liable to account to A. for such dividends in an action for money had and received.  
*Id.*

3. The remedy, in such cases, it seems, is to be sought in a Court of Equity.  
*Id.*

4. In an action of assumpsit at law, by one partner against another, he must show more than a right to an account; he must show an actual account, or a division of the stock, or an adjustment and promise to pay.  
*Id.*

5. One partner may execute, in the name of the firm, an instrument under seal, necessary to the usual course of their business, which will be binding upon the firm, provided an authority for that purpose be previously communicated to him by the co-partner. *Gram v. Seaton & Bunker*,  
262

6. But this authority need not be by an instrument under seal, nor in writing, nor specially communicated for that specific purpose; but may be general, and inferred from the partnership itself, and from the subsequent conduct of the co-partner, implying an assent on his part to the act of the partner, who executed the deed.  
*Id.*

7. The defendants, (who were partners,) by an instrument under seal executed by one in the name of both, chartered the whole of a vessel (except the ca-

bin) of the plaintiff, for a voyage from New-York to Angostura, and were, by the terms of the charter-party to be allowed one passenger. Two passengers, however, were sent out in the vessel by the defendants; and in an action of covenant brought upon the charter-party, it was *held*, that the instrument was well executed; but that the putting of the two passengers on board, was not such a breach of the covenant, as would allow the plaintiff to recover the amount of the *passage money*, for the extra passenger, in this form of action. If entitled to recover at all, he should resort to an action of assumpsit, either against the passenger, if he had not paid for his passage, or the defendants, if they had received the amount of the passage money. *Id.*

8. Although the general rule is, that demands growing out of partnership dealings, cannot be set off against individual demands on one of the partners, yet a special agreement for that purpose may of course be made, which will be binding on the parties, and entitle the defendant to the set off claimed. *Swall v. Rodewald*, 348

9. A court of law cannot take jurisdiction of accounts between partners. *Rogers v. Rogers*, 391

10. To an action upon a promissory note, the defendant pleaded that the note was given as the consideration of a release of a certain lot of land held by himself and his co-partner *jointly*, upon the supposition, that the balance of the partnership accounts was in favour of such co-partner; whereas, in point of fact, the balance was in his own favour, and so, that the consideration had failed. The plaintiffs replied, that the balance of said accounts was not in favour of the defendant, and that the said lot of land was held by the said co-partners, not jointly, but as

tenants in common. Upon demurrer to this replication, it was *held*, that the plea was no bar to the action, as it sought to cause an investigation of accounts between partners, before a court of law. The plaintiffs, therefore, had judgment on the demurrer. *Id.*

11. A Court of Equity has exclusive jurisdiction of accounts between partners, and a plea in bar of an action upon a promissory note, which sought to open partnership accounts, for the purpose of showing, that there was a mistake in the note, and that its consideration had failed, was adjudged to be bad upon demurrer. *Rogers v. Rogers & Rogers*, 394

## PAYMENT.

See CHECK UPON A BANK, 1. ASSUMPSIT, 1. DEBT ON BOND, 2.

## PAYMENT OF MONEY INTO COURT.

See USAGE, 4, and the note at the end of the case, 618

## PEOPLE.

See SHERIFF.

## PLEAS.

See JUDGMENT, 1.

## PLEADING.

See COVENANT. JUDGMENT, 1, 2, 8; INSURANCE, 6.

1. A defect for duplicity in pleading, cannot be taken advantage of by general demurrer, but it must be specially pointed out; and upon a general demurrer to two or more counts, if one be good, there will be judgment for the plaintiff. *Wolfe v. Lyster*, 146

3. The first count of the declaration set forth, that the defendant (an auctioneer) received certain goods of the plaintiff, to be sold for him, under an agreement not to part with or dispose of them below a certain stipulated price; and that, in violation of this agreement, he had sold the goods for a sum below that to which he was restricted, and had not accounted for the proceeds. The second count alleged, that the defendant received the plaintiff's goods for sale, and agreed to render, as the amount brought by said goods, the full sum of \$500. The breach assigned was, that the defendant had not rendered a just account of the goods, nor paid the full sum of five hundred dollars.

Upon a general demurrer to these two counts, the first was held to be good in substance, although defective for duplicity in assigning the breach; but the second was held to be bad on the face of it, for the want of an averment of the sale of the goods. *Id.*

3. In every action upon a special agreement, the declaration must set forth a sufficient consideration; and any material variance in the proof of the consideration will be fatal to the plaintiff's recovery. *Wheelwright v. Moore*, 201.

4. The plaintiff declared upon a special agreement of the defendant, to guaranty the payment of certain promissory notes made by one B., in favor of the plaintiff, in consideration of a sale and delivery of goods by him to S.. At the trial the plaintiff introduced the special agreement in evidence. This agreement recited the notes of B., which purported to be for value received, but contained no consideration for the defendant's promise, except such as might be inferred from the words "value received" used in the notes; and no other evidence of a consideration was offered. Upon demurrer to this evi-

dence, it was held, that the proof did not meet the declaration; but as it was competent for the plaintiff to support the action by parol proof, that the sale of the goods and delivery of the agreement were concurrent acts, the court awarded a venire *de novo*, to give the plaintiff an opportunity of proving all the facts of the case. *Id.*

5. In declaring upon a deed executed for a principal, by his attorney, it is sufficient to count upon the deed according to its legal effect; and the authority by which the attorney so executes the deed need not be stated. It is the deed of the principal and may be declared on as his. *Grass v. Seaton & Bunker*, 299

6. In an action against a witness for the penalty imposed upon him by the statute, [1 R. L. 524,] for not attending at a trial, when duly subpoenaed, the declaration must state specially, among other things, that the fees of the witness were paid or tendered to him, and it is not sufficient to allege that the witness was "legally subpoenaed according to the practice of the court." *McKeon v. Lane*, 319

See GUARANTY, 1, 2. DEBT, 1, 2, 3. INSURANCE, 5, 6. LANDLORD, 2. PARTNERS, 7, 10. PRACTICE, 12. SLANDER, 1, 2, 3, 4.

## POLICY OF INSURANCE.

See INSURANCE.

## POSSESSION.

See PROMISSORY NOTES, 3, 4. PRACTICE.

## POST NOTES.

See PROMISSORY NOTES, 3.

PRACTICE

1. A default regularly entered, will never be set aside without an affidavit of merits. *Allen v. Thompson*, 54
2. The declaration, in this case, contained both special and common counts. The defendant pleaded specially to the former, but omitted the general issue to the latter. The plaintiffs caused the special pleas to be stricken out, as *sham* pleas; entered a *nolle prosequi* on the special counts, and a *default* for want of a plea to the common counts. The default was held to be *regular*; but the defendant was permitted to set it aside, on payment of costs, and filing an affidavit of merits. *Id.*
3. In this court, no copy of a declaration, or other pleading, can be served upon the opposite party, until after the original has been filed with the clerk, and an appropriate rule entered in the rule book. *Bracket v. Simonds*, 76
4. Where the defendant has obtained a discharge under the act "to abolish imprisonment for debt," after the commencement of the suit, the plaintiff will be permitted to discontinue without costs, though the defendant, relying upon a defence to the form of the action, offers to waive his discharge. *Ashworth v. Wrigley*, 145
5. An application to amend the declaration, will at all times be granted, upon payment of costs, where such amendments do not operate as a surprise upon the defendant, nor subject him to injury. But the defendant, in such a case, will be permitted to withdraw his pleas, and plead again, *de novo*. *Penny et al. v. Van Cleef*, 165
6. The affidavit of a party to a suit, made in the progress of a cause, for the purpose of resisting a proceeding on the part of his antagonist, cannot be excluded by counter affidavits, setting forth, that the party making the affidavit is an atheist. *Leonard v. Manard*, 200
7. The competency of a witness cannot be attacked in this collateral way, as he has no opportunity for explanation or reply. *Id.*
8. But where a party has been induced to make an application to the court, by the incorrect declarations of the opposite party, the court, although they may refuse the application, will compel the party in fault to pay the costs of the application. *Id.*
9. On an attachment against the sheriff for not returning the defendant's body, it appeared that bail had been put in, and had justified, subsequently to the rule for the attachment, but no notice thereof had been given to the plaintiff's attorney, although he was present at the justification. *Held*, that the want of notice was an irregularity, and that the costs incurred subsequently to the rule, should be paid by the sheriff. *Mitchell v. Roulstone & Stickney*, 218
10. The certificate of the clerk, that the rule on which the attachment is grounded, has been entered, must in all cases accompany the affidavit of notice of motion for an attachment against the sheriff, for not returning the defendant's body. *Id.*
11. Where upon demurrer to the plaintiff's declaration, the demurrer is overruled, and leave given to the defendant to answer over upon payment of costs, it is the duty of his attorney to seek the opposite party without delay, pay the costs, and plead to issue. *Wolfe v. Luyster*, 220
12. Where a plea in abatement has been interposed on the part of the defendant by mistake, and under a misapprehen-

sion of facts, the court will, upon a proper application, and upon prescribed terms, permit the plea to be withdrawn, notwithstanding it has been verified by affidavit. *Tally v. Hamilton*, 222

13. Where an important witness is absent from the country, and will not return until several terms have elapsed, this court will put off the cause for a reasonable period, notwithstanding the delay may comprehend more than one term. *Smith v. The New-York Ins. Co.*, 223

14. Where a defendant, in an action of assault and battery, has been held to bail without an affidavit, and without an order of a judge for that purpose, to an amount exceeding \$500, the court, upon application, will order the bail to be reduced to that sum. *Ballingall v. Burnie*, 237

See BAIL, 1, 2, 3. COSTS. INFANT. PROMISSORY NOTES, 4. USAGE, 4.

### PRELIMINARY PROOFS.

See INSURANCE, 16, 17.

### PRESUMPTION.

See CORPORATION, 1. JUDGMENT, 2.

### PRINCIPAL AND AGENT.

See INSURANCE, 16, 17.

### PRINCIPAL AND ATTORNEY.

See PLEADING, 5.

### PUBLIC OFFICER.

See SLANDER, 5.

### PROMISE.

See GUARANTY. PLEADING, 3.

### PROMISSORY NOTES.

1. Illegality of consideration, (except in particular cases arising under certain statutes,) does not avoid a note in the hands of a *bona fide* holder without notice. *City Bank v. Barnard & Macy*, 70

2. Certain directors of the City Bank of New-York, for the purpose of controlling the election of its officers, entered into an arrangement for the purchase, upon the account of the Bank, of a large amount of its stock, (then held by a certain individual,) at a premium of seven per cent above its par value.

To effect this object, they paid for the stock with the *funds of the bank*, to the amount of its par value, and transferred the same in trust for the Bank. For the purpose of paying the amount of the *premium*, each director borrowed \$3500, of the Bank, by causing his own promissory note, regularly endorsed, to be discounted at the Bank.

In an action brought by the Bank, upon one of these notes against the endorsers thereof, they were not allowed to set up the *illegality* of the original transaction as a defence against the note. *Id.*

3. Where the holder of a promissory note has obtained possession of it by fraud, he cannot maintain an action upon the note against any of the parties to it. *Talman v. Gibson*, 308

4. Possession is *prima facie*, evidence of a transfer to the holder: yet, if the defendant can show that the plaintiff obtained the note by his own fraudulent act, he has a right to defeat the action on that ground, although he may be liable to pay the note to the true owner *Id.*

5. The consideration *merely*, on which



the note was received by the holder, is not to be questioned; but the defendant may show that no consideration was paid by the holder, as *one step* towards the proof of fraud, on his part, in obtaining the note. *Id.*

6. It *seems* that the defendant cannot require proof of consideration on the part of the plaintiff in such a case, unless he has given seasonable notice to the plaintiff that he means to insist at the trial, that he shall prove the consideration on which he received the note. *Id.* 313

7. Where the maker of a promissory note endorsed the same for his own benefit in the payee's name, by virtue of a parol authority for that purpose communicated to him by the payee, it was held to be well endorsed; and that the payee was liable upon such endorsement, in the same manner as if it had been made by himself with his own hand. *Turnbull & Phye v. Trout*, 336

8. It is not necessary that the authority by which one person executes a written agreement for another and in his name, should be in writing also; although such written agreement may not be for the benefit of the party bound by it. *Id.*

9. The engagement of an endorser of a promissory note, is not a collateral undertaking to answer for, or pay the debt of another person, within the meaning of the statute of frauds. *Id.* 340

10. The subsequent *assent* of the defendant to the endorsement, is a waiver, *it seems*, of any exception which might otherwise be taken to the sufficiency of the authority by which the note was endorsed. *Id.* 347

11. Where a negotiable promissory note, endorsed in blank by the payee, has been fraudulently or feloniously taken from the true owner, and that fact is

shown at the trial; the person into whose hands it passes, cannot recover upon it against the maker, unless he show himself to be an innocent and *bona fide* holder for a valuable consideration. *The Fulton Bank v. The Phoenix Bank*, 562

12. The Phoenix bank of the City of New-York, issued a post-note payable 60 days after date, to J. G. or order, on demand. This note, being endorsed by J. G., was put into the mail at Charleston in the State of South Carolina, to be transmitted to N. Y.; but the mail being robbed, it never reached the hands of the true owners, but passed into the possession of Prime, Ward, King & Co., who deposited it in the Fulton Bank and received credit for a like amount, in account with that bank. The plaintiffs presented the note to the Phoenix Bank for payment, and it was refused, upon the ground that the note had been stolen from the true owners, who had requested the defendants not to pay it. The amount of the note although passed to the credit of P., W., K. & Co., by the Fulton Bank, had never been drawn out by them, and upon action brought by the Fulton Bank, against the makers, to recover the amount of the note,—it was held, that the mere act of giving credit to P., W., K. & Co., for that amount, by the Fulton Bank upon their books, did not constitute them *bona fide* holders of the note for a valuable consideration. *Id.*

13. Bank post notes, over due, are not to be regarded as subject to all the rules applicable to ordinary promissory notes, but they become assimilated in their character to ordinary Bank notes. *Id.*

See PARTNERS, 10, 11. USURY.

PORT WARDENS.

See USAGE, 6.

**R****RECOGNISANCE.**

On an attachment against the Sheriff for not returning a *fi. fa.*, ruled, that the recognisance be in double the amount of the *fi. fa.*, and that the Sheriff should answer such interrogatories as should be regularly exhibited. *The People v. Lowndes*, 225

**REGULA GENERALIS.**

See PRACTICE, 3. [P. 76. *Respecting the service of Pleadings and filing the same.*]

**RELATOR.**

See FORCIBLE ENTRY AND DETAINER.

**RELEASE.**

See USURY, 5.

**RELIGIOUS BELIEF.**

See PRACTICE, 6, 7.

**REFERENCE, REFEREES.**

1. Where referees certify to the court, that they have overlooked a circumstance connected with the accounts submitted, and request that the same may be sent back to them for re-examination, the court will set aside the award and send back the accounts to the same referees. *Brittingham v. Stevens*, 379
2. In an action upon a policy of insurance against fire, if the defendants admit that they are liable for the loss, and the controversy between the parties relates solely to items of injury, and the amount of loss sustained by the assured, the court will refer the matter to referees, to adjust the amount. *Samble v. The Mechanics' Fire Ins. Co.* 560

3. In mixed questions of law and fact, where long accounts are involved, it is the practice of the court to hear the cause until the questions of law are disposed of, and then refer the accounts to referees. If the referees named are objected to by either party, the court will draw them from the jury box. *Id.*

See AWARD, 1, 2.

**RENT.**

See DEBT, 2, 3, 4.

**REPLICATION.**

See GUARANTY, 4.

**RESTRAINING ACT.**

See USURY, 2.

**RESCUE.**

1. The plaintiff was the bail of one Windsor, and for the purpose of surrendering him, deputed one Carr to arrest W. at Newport, R. I., and bring him to New-York. Carr arrested W., and without the captain's knowledge, put him on board the steam-boat (Chancellor Livingston, in order to bring him to New-York. The defendant, Coggeshall, (who was the master of the boat,) aided in some measure by Northam, (a part owner and passenger,) after the boat left the wharf, and when he discovered that W. was on board the boat against his will, put him and Carr on shore together, and refused to permit W. to be carried to New-York. In an action against the master and Northam, for a rescue, it was held, that the proof did not support the declaration, and the jury having found a verdict for the defendants, the court refused to set it aside. *Dow v. Northam and Coggeshall*, 326

S

SALE AND DELIVERY OF  
CHATTELS.

See SHERIFF, 5.

SALVORS.

See INSURANCE, 22.

SEAMEN.

A seaman charged with disobedience of orders and mutinous conduct, was voluntarily discharged from the ship by the captain, who expressed regret for the difficulties which had occurred, and promised to pay the seaman his wages. In an action brought by the latter against the master it was held, that the captain's promise operated as a waiver of any forfeiture of wages by the seaman, for disobedience of orders during the voyage. *Austin v. Dewey*, 238.

See INSURANCE, 22.

SET-OFF.

See PARTNERS, 8.

SHERIFF.

1. Where the sheriff has endorsed upon an execution the day and hour when it was received, the endorsement is conclusive evidence of the fact, that the execution was in his possession at that time; and when he has assumed to act under it, he cannot compel the creditor, who has sued him for a false return, to prove at the trial the identity of the execution, either by witnesses or collateral testimony. *Williams v. Lowndes*, 579

2. Where goods are in the hands, and under the controul, of the defendant in the execution, and they are pointed out as his property to the sheriff, by the creditor, the sheriff is bound to levy upon them, without an indemnity; and

if he neglect to do so, and the goods are afterwards removed beyond his reach, by the defendant in the execution, he will be answerable to the creditor for his neglect. *Id.*

3. If, after a levy, a claim to the goods be interposed by a third person, the sheriff may then demand an indemnity before he can be compelled to proceed further; and his regular course will be, to call a jury *de proprietate probandi*. If he make the levy and follow this course, he will not be liable for a trespass, and the parties claiming the goods may be compelled to litigate their claims, and decide the question of property, before the sheriff can be compelled to make his return, or proceed to a sale. *Id.*

4. *Quare*.—Whether the deputy, who makes the levy can be compelled to testify as to the identity of the execution, in an action against the sheriff for a false return; and whether he be not incompetent as a witness, for any purpose connected with the action? *Id.*

5. The property in goods in a store, conveyed to a third person by an instrument of assignment, dated after the docketing of a judgment against the assignor, and left in his hands, without any good reason shown therefor, does not pass to the assignee, and the assignment itself is fraudulent and void. The presumption, in such cases, is, that the assignment was made to defeat the judgment, and it will not be upheld. *Id.*

See COSTS, 3. PRACTICE, 9, 10. RECOGNISANCE.

SHIP-OWNER.

See LIEN, 1, 2.

## SHIPWRECK.

See INSURANCE, 2.

## SLANDER.

1. In an action of slander, no evidence can be given of any loss or injury sustained by the plaintiff, unless the same be specially stated in the declaration, and this, whether the special damage be the gist of the action, or whether the words be actionable *per se*. *Shipman v. Burrows*, 399
2. Where, therefore, under the allegation, that, in consequence of the speaking of the slanderous words, "certain Insurance Companies in the city of New-York refused to insure any vessel commanded by the plaintiff, or any goods laden on board any vessel by him commanded," the plaintiff was permitted to prove that the *New-York Insurance Company* refused to make such insurance: the evidence was held to have been improperly admitted. *Id.*
3. In this action, the plaintiff cannot give evidence of the fairness of his general character, until it is attacked by the defendant; and the fact, that a justification has been pleaded, makes no difference in the rule. *Id.*
4. Where the plaintiff, therefore, was allowed to give evidence of his general good character, after the defendant had gone through with his defence, without impeaching such general character, this evidence was also held to have been improperly admitted. *Id.*
5. It is well settled, that in an action of slander, for words which are not actionable *per se*, the plaintiff cannot recover, unless he shows special damage as the consequence of the words. And *quære*: Whether words spoken by a public officer in his official capacity, concerning

another, are ever actionable? And if so, whether the plaintiff must not show express malice, in order to maintain the action? *Harcourt v. Harrison*, 474

## STATUTE.

See ASSUMPSIT, 2, 3. BAIL, 1. USURY, 2.

## STATUTE OF FRAUDS.

See PLEADING, 4. PROMISSORY NOTE, 9.

## STEVEDORE.

See WITNESS, 3.

## STORING.

See INSURANCE, 15.

## STOWAGE.

See USAGE, 6.

## STOLEN NOTES.

See PROMISSORY NOTES, 11, 12.

## STRANDING.

See INSURANCE, 25, 26.

## SUBPŒNA.

See COSTS, 2. PLEADING, 6.

## SURVEY.

See USAGE, 6.

## T

## TARE.

See USAGE, 3.

## TITLE.

See FORCIBLE ENTRY AND DETAINER, 2.

TRUSTEES.

See CORPORATION, 3.

U

USAGE.

1. At the trial of an action upon a policy of insurance, the plaintiffs were permitted by the presiding Judge, to prove that it was the usage of commission merchants in the city of New-York, to effect insurance on goods consigned to them for sale on commission, without express orders from their consignors; and it was *held*, that the proof of such usage was rightly admitted. *De Forest v. The Fulton Ins. Co.*, 84
2. Usage of trade cannot be set up, either to contravene an established rule of law, or to vary the terms of an express contract. But all contracts made in the ordinary course of business, without particular stipulations, expressed or implied, are presumed to be made in reference to any existing usage or custom, relating to such trade; and it is always competent for a party to resort to such usage, to ascertain and fix the terms of the contract. *Sewall v. Gibbs & Jenny*, 602
3. The defendants purchased of the plaintiff a ceroon of indigo, at public auction. Notice was given, at the time of sale, that the indigo would be sold subject to the usual tare of 10 per cent. The tare, in point of fact, amounted to upwards of 17 per cent. At the trial, the defendants were permitted to prove, that the indigo had been fraudulently packed, and that, in all cases of fraudulent packing, it is the custom of the trade, to allow the purchaser the actual tare. *Held*, that this evidence was rightly admitted. *Held*, also, that the defence was properly set up, under the general issue, and that the defendants could claim a deduction of the actual tare, without offering to return the indigo. *Id.*
4. The defendants, sometime after the purchase, paid into court a sum sufficient to cover the amount of the indigo, after deducting the actual tare. *Held*, that as the sale in this case, was for cash, the plaintiff was also entitled to interest, from the day of sale to the day of payment, and, therefore, that the amount paid into court, was not sufficient to cover the plaintiff's demand. *Id.*
5. Although usage may be resorted to, to fix the sense of particular terms in a policy of insurance, where they have acquired a peculiar meaning, as between assurers and assured, yet it can never be set up, to affect or vary an express agreement, nor to contradict a rule of law. *Rankin & Rankin v. The American Ins. Co.*, 619
6. Therefore, in an action upon a policy of insurance, where the claim was for damage sustained by the perils of the sea, and on the arrival of the goods at New-York, they were landed, before the wardens of the port had held a survey upon them, the defendants were not allowed to prove, either as an objection to the preliminary proofs, or in bar of the action, that "by the usage of trade, in the port of New-York, the master of the vessel is responsible for damages sustained by goods, delivered by him to the owner, or consignee, unless there has been an actual survey, on board the vessel, by the port wardens, by which it shall have been found, that the goods were properly stowed, and were damaged on the voyage by the perils of the sea; and that, by a similar usage, as between assurers and assured, the survey so made, is a document indispensable to be produced, in order to

"charge the underwriters, and that the preliminary proof is deemed insufficient, unless such a document is exhibited as a part of it." *Id.*

### USURY.

1. The Hudson Insurance Company of the city of New-York, on the 22d of October, 1825, through Mr. Spencer, their President, made a temporary loan of \$14,000 to the firm of Keeler & Rogers. As collateral security for this loan, the borrowers put into the hands of Spencer two promissory notes, one for \$15,000, and the other for \$10,000; each of which was signed by the *defendant*, (among others,) and payable twelve months after date to the order of Keeler & Rogers, and which notes were made, as the *defendant* alleged, for their *accommodation*. K. & R. at the same time owed the Company about \$22,000 for *other* and anterior loans, made upon bills and notes which had been discounted by the Company for their benefit.

The terms upon which the Hudson Company usually made their discounts, were these: The borrower took the amount of his note in *bonds* of the Company, bearing an interest of six per cent., which were made payable at a day more distant than that on which the loan would fall due; and at the same time, the borrower paid to the Company in *cash* a discount of six per cent. on the note, together with a *premium*, at the rate of six per cent. per annum, on an insurance of a life or lives, during the running of the note; which life insurance the borrower was supposed to apply for; but no policy, in fact, was ever issued, and the rate of insurance was uniformly the same, without regard to the condition of the life to be insured.

When the aforesaid loan of \$14,000 was made, it was agreed between Spencer and Keeler, that the two notes which

were put into the hands of the former, should remain as a security for that sum, until a certain arrangement, which was then pending between other parties for a loan of \$50,000 in favour of Keeler & Rogers, should be completed, and then the \$14,000 were to be returned, and the notes given up. And it was also further agreed, that in case the loan of \$50,000 should not be raised, and the house of K. & R. should stop payment, the Hudson Company should hold the notes as security, not only for the \$14,000, but also for any *other debts* then due, or which might become due from K. & R. to the Company.

The loan for \$50,000 was not effected; and on the 29th of October, the house of Keeler & Rogers stopped payment. Before this period, however, (to wit, on the 26th of October,) the two notes above mentioned were *exchanged* by the Company for two *other* notes executed by the same parties; one of which (the note in controversy) was for \$15,000, and the other for \$5000: but at the time of this exchange, nothing was said relative to the terms on which the new note should be held. Subsequently to this, (in the month of June, 1826,) the note for \$15,000 was transferred by Spencer to the Fulton Bank, under circumstances somewhat peculiar, and they instituted this suit thereon against the *defendant*, (one of the makers,) who set up usury (among other things) as a defence. The Judge, at the trial, (for the purpose of bringing up the question of law,) charged the jury, that the note, although it might have been negotiated to the Hudson Co. to secure the payment of pre-existing usurious paper, was not, therefore, usurious in their hands. The jury having found a general verdict for the plaintiffs under this charge, the defendant tendered a bill of exceptions, and upon the argument, it was held, *that if on the discounting of the accommodation notes*

and drafts held by the Company on the 22d of October, the premium of six per cent. on life insurance was taken as a cover for exacting more than legal interest on those loans, these notes and drafts were usurious. Held also, that if the note on which the action was founded was made solely for the accommodation of Keeler & Rogers, and was negotiated by them to the Hudson Co. as security in whole or in part for such usurious paper, then the note itself was *usurious* and *void*. That these were questions of fact, nevertheless, to be submitted to the jury: and, however strong the evidence might be, the court had no right to determine them. A new trial, therefore, was granted upon these points, for the purpose of causing the questions of fact to be determined by a jury. *The Fulton Bank v. Benedict*, 480

2. It seems that the note in question, having been given to, or negotiated by, a Company, which, by its charter, had no banking powers, was void under the restraining act. But if not void by that act, as it was taken by the Hudson Company in a transaction not authorized by their charter, no action could be sustained on it by the Company. If the plaintiffs had no notice, when they took the note, that it had been negotiated to the Hudson Company contrary to its charter, the illegality of the transaction could be set up against them as a defence. *Id.*

3. Notice.—What shall be considered as notice to a corporation, is not settled; but under some circumstances, notice to a director ought to charge the corporation,—as where the director acts as the agent of the corporation. *Id.*

4. As to the extent of the recovery.—The plaintiffs cannot, in any event, recover beyond the amount of their advance. *Id.*

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5. *Quære*.—Whether Keeler, (one of the persons for whose benefit the note was made and discounted,) could be a witness to prove the usury? *Id.*

## V

### VALUATION.

See INSURANCE, 30.

### VARIANCE.

See PLEADING, 3.

### VENDOR AND VENDEE.

See SHERIFF, 5.

### VENIRE DE NOVO.

See PLEADING, 4.

## W

### WAGER.

See HORSE RACING.

### WAGES.

See SEAMEN.

### WAIVER.

See ASSUMPSIT, 1. PRACTICE, 4. PROMISSORY NOTE, 10. SEAMEN.

### WITNESS.

1. A witness cannot be asked it seems whether from his personal knowledge of an impeached witness, he would believe him under oath. The true rule is to inquire of the impeaching witness his means of knowing the general character of the witness impeached, and whether from such knowledge he would believe him under oath. *Fulton Bank v. Benedict*, 480

2. If a witness' character is declared by an impeaching witness to be *bad*, from some particular cause, an enquiry may be made, it seems, into the origin of that

opinion for the purpose of enabling the jury to estimate it properly. *Id.*

3. A stevedore, employed by the master to stow the cargo, is a competent witness to prove that it was properly stowed. *Rankin & Rankin v. The American Ins. Co.*, 619

See PRACTICE, 7, 13. NEW TRIAL, 1. PLEADING, 6, USURY, 5. SHERIFF, 4.

### WILL.

A testator by his will, dated, April, 1798, devised as follows: "I give and bequeath to my wife Sarah all my estate, real and personal, during her life: the house and lot No. 37, situated in Mulberry-st, to my heirs Maria and Eliza, in fee simple forever: if one of them should die, the property to descend on the other: in case both should die, the property to descend to my wife"; "only she is to pay my brother, A. G." one shilling if demanded."

The testator died in 1798. Maria died in her childhood, Eliza attained the age of 21 years, married, but died in the life time of her mother, without leaving; or ever having had any issue, and without making any distribution of her property. The widow shortly after the testator's death, married and had issue, five children, who were her heirs at law; and continued in possession of the premises until her death in 1827. After her death A. G., the brother of the testator and his heir at law brought an action of *ejectment*, for the recovery of the house and lot, described in the will. *Held*, that he was not entitled to recover.

That the words "if one of them should die," and "in case both should die." should be taken to mean *a dying without lawful issue*; that the court were at liberty to supply the words, in order to carry the testator's intention into effect; and that upon the death of the daughters without issue, the whole estate in the house and lot became vested in their mother. *Jackson ex dem. Gatfield v. Strong*, 1

*Ex. G. A. A.*







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